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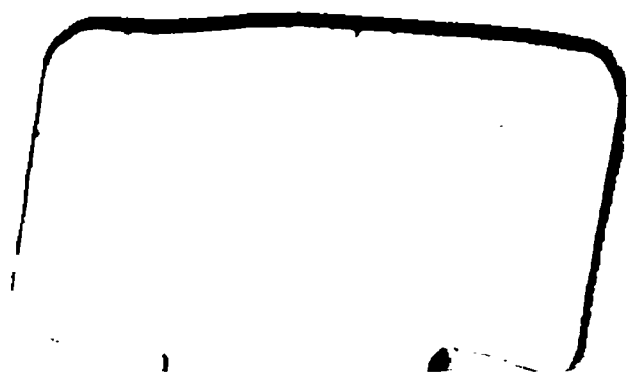
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**MODERN  
PLEADING AND PRACTICE  
IN EQUITY**

**IN THE**

**FEDERAL AND STATE COURTS OF THE UNITED STATES,  
WITH PARTICULAR REFERENCE TO THE  
FEDERAL PRACTICE,**

**INCLUDING**

**NUMEROUS FORMS AND PRECEDENTS.**

**BY**

**CHARLES FISK BEACH, JR.,**

**OF THE NEW YORK BAR,**

**AUTHOR OF "PRIVATE CORPORATIONS," "MODERN EQUITY JURISPRUDENCE,"  
"CONTRIBUTORY NEGLIGENCE," "RECEIVERS," ETC.**

**IN TWO VOLUMES.**

**VOL. I.**

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TO THE  
HONOURABLE DAVID J. BREWER,

ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF  
THE UNITED STATES, AND SOMETIME THE CIRCUIT  
JUDGE OF THE UNITED STATES FOR THE  
EIGHTH JUDICIAL CIRCUIT.

MY DEAR JUDGE BREWER:—

I take the liberty of dedicating this work on the Modern Practice in Courts of Chancery to you, not more because you are a master of the learning of the subject than because it was my good fortune a few years ago to come frequently before you, at Circuit, in the litigation incident to some complicated railway foreclosures, and in that way to lay, in some sort under your judicial tuition, the foundations of whatever practical knowledge of such procedure I may possess. At the same time I was so happy as to form your acquaintance,—all which I have thought warrants the hope upon my part that you still number me among your friends of the junior bar. You will possibly remember, as I have always done with very great satisfaction, that I was so fortunate as to be present in your court at Topeka upon the day and at the moment when your elevation to the Supreme bench was announced to you from Washington.

It is not insignificant perhaps, in this connection, that more than a century ago an English lawyer put out a thin volume, now long forgotten, which he entitled "*The Modern Practice of the High Court of Chancery*," from which it appears that, even then, there was an antiquated practice in Equity, which the lawyers of that day thought should be revised and modernized. Neither my title, therefore, nor the idea upon which my book has been written, is new. If, however, it shall turn out that, by what is here done, I have contributed something to the orderly development and growth of a science that can, in the nature of things, not cease to grow until chancery courts are closed, perhaps you will think that I have not beaten the air.

The little treatise to which I have referred was dedicated "To the Right Honourable Edward Lord Thurlow, Baron Thurlow of Ashfield, in the County of Suffolk, Lord High Chancellor of Great Britain," and the author concludes his dedication in this quaintly graceful phrase:—"If this performance should find a favourable reception from your Lordship, my ambition will be gratified, and my pains and attention in compiling it fully recompensed by the honour which your Lordship's approbation will confer on My Lord, Your Lordship's most devoted and obedient humble servant, Robert Hinde. Lincoln's-Inn, Nov. 28th, 1785."

In some such a temper as my predecessor thus displayed, I have the distinguished honor, My Dear Sir, in dedicating this work to you as a slight expression of my respect and esteem, to subscribe myself,

Very Sincerely Yours,

CHARLES F. BEACH, JR.



## PREFACE.

---

I have designed this work to be a convenient manual of the present practice in all Courts of Chancery, but with particular reference to suits in the federal courts. Inasmuch as the practice in the United States Circuit Courts of Appeals is new, and in consequence at least measurably unsettled, I have given very especial attention to that branch of the subject, endeavoring to include a full statement of every point decided in reference to such appeals down to the time of going to press.

After the greater part of my work was written I came across an old volume of English Equity Practice entitled as follows:—“The Modern Practice of the High Court of Chancery, methodized and digested in a manner wholly new. Interspersed with variety of the most approved and modern forms of Practical Precedents incidental to every suit in the progress of it, from the original Bill to the Decree: comprising a system of practical knowledge, according to the course of the Court as at present established: by Robert Hinde, of Lincoln’s-Inn, Esq.; Dublin: Printed for Messrs. E. Lynch, G. Burnet, W. Colles, R. Moncrieffe, J. Beatty, J. Davis, R. Marchbank and J. Jones. MDCCLXXXVI.” This discovery served at once to inform me that a work upon *Modern* Equity Practice was not new an hundred years ago, and equally to assure me that such a work as this of mine may now, in this new country of ours and at the end of the nineteenth century, not wholly lack justification.

In the preparation of this work substantial assistance has been derived in many particulars from the excellent book on Federal Practice by Roger Foster, Esq., of the New York Bar, to whom the author makes his grateful acknowledgments.

I have endeavored to state the rules and precedents of the practice as they are to-day; and in the forms to furnish models upon which the careful solicitor, having an intelligent regard to the particular conditions of his particular case, may safely proceed. Most of the forms which I include have been

approved in practice, very many of them in my own practice. The subject is not without its essential difficulties, and I cannot hope entirely to have escaped mistakes. The work, however, has been conscientiously done, and will, I trust, be useful to many lawyers.

CHARLES F. BEACH, JR.

NO. 88 WALL STREET, NEW YORK,  
March 10th, 1894.

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# MODERN EQUITY PRACTICE.

## CHAPTER I.

### INTRODUCTORY — GENERAL SURVEY.

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| <p>§ 1. Chancery practice in England.</p> <p>2. Sources of federal practice in the United States.</p> <p>3. Construction of Equity Rule 90.</p> <p>4. Code practice in the United States.</p> <p>5. Federal practice in respect of cases involving legal and equitable claims.</p> | <p>§ 6. Enforcement of new rights created by local law.</p> <p>7. Enforcement of State rules of property.</p> <p>8. Effect of local laws further considered.</p> <p>9. Practice in proceedings between States.</p> <p>10. Equity practice in New Jersey.</p> |
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§ 1. Chancery practice in England.— The foundation of equity practice, as well as of equity jurisprudence, lies in the English High Court of Chancery. But the abuses and absurdities prevailing in the administration of every branch of the law induced the adoption of several radical reforms, beginning in the early part of this century, so that the equity practice in England is now essentially different in many respects from the ancient system. In 1833 the first important procedure amendment act <sup>1</sup> was passed. It abolished some of the unnecessary offices, diminished the fees and emoluments, and provided that suits in equity were to be commenced by an open writ prepared by the plaintiff and issued under an office seal, instead of the old subpcena under the great seal. Substantial changes were also made of applications for time to answer and for leave to amend bills. Then followed from time to time numerous improvements in chancery practice and procedure, until in 1873 the first judicature act was passed under the auspices of Lord Selborne and Lord Cairns.<sup>2</sup> “It provided for the consolidation of all the existing superior

<sup>1</sup> 3 and 4 Will. IV., ch. 94.

<sup>2</sup> The act came into operation in 1875.

courts into one supreme court, consisting of two primary divisions, a high court of justice and a court of appeal. The former was subdivided into several divisions of which one was to be the chancery division. To the high court of justice were transferred the jurisdictions of all the amalgamated courts, and all pending business. Law and equity, it was provided, were to be administered concurrently by every division of the court, in all civil matters, the same relief being granted upon equitable claims or defenses, or equities incidentally occurring, as would have been previously granted in the court of chancery; no proceeding in the court was to be stayed by injunction analogous to the old common injunction, but the power for any branch of the court to stay proceedings before itself was of course to be retained; and the court was to determine the entire controversy in every matter that came before it. By the twenty-fifth section of the act rules upon certain of the points where differences between law and equity had existed, deciding in favor of the latter, were laid down, and it was enacted generally that in case of conflict the rules of equity should prevail. Actions upon matters of the nature previously within the exclusive jurisdiction of the court of chancery were assigned to the chancery division, but power to transfer from one division to another was reserved. A general system of procedure for all the divisions was drawn up and has since been elaborated in detail by rules of court issued under a subsequent act.”<sup>1</sup>

§ 2. Sources of federal practice in the United States.—It is provided in section 917 of the Revised Statutes of the United States as follows:—“The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate

<sup>1</sup> Kerly's "Historical Sketch of the Equitable Jurisdiction of the Court of Chancery," p. 275 *et seq.* See, also, the admirable and compendious treatise of A. H. Marsh, Q. C., on the "History of the Court of Chancery."

the whole practice to be used in suits in equity or admiralty by the circuit and district courts." Section 918 provides that "the several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." Under these provisions there have been promulgated thirty-eight "rules of the Supreme Court of the United States," not all of which, however, relate to equity procedure, and ninety-four "rules of practice in equity." The circuit and district courts have also adopted rules of their own, and to these must be added the rules of the circuit court of appeals in each of the nine circuits, the latter being substantially but not precisely identical.<sup>1</sup> The ninetieth rule in equity provides that "in all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." Rule 8 of the circuit court of appeals provides that "the practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable." The ninetieth rule, above mentioned, is further considered in the following section.

§ 3. Construction of Equity Rule 90.—In a note to *Thompson v. Wooster*,<sup>2</sup> determined in 1884, Justice Bradley, speaking for the United States Supreme Court, placed the following construction upon Rule 90:—"Reference is made to the first edition of Daniell (published 1837) as being, with the second edition of Smith's Practice (published in the same year), the

<sup>1</sup> All of these rules are published in the appendix to this work.      <sup>2</sup> 114 U. S. 104, 112.

most authoritative of English chancery practice in use in March, 1842, when our equity rules were adopted. Supplemented by the general orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our own rules), they exhibit that 'present practice of the High Court of Chancery in England,' which by our ninetieth rule was accepted as the standard of equity practice in cases where the rules prescribed by this court or the circuit court do not apply. The second edition of Mr. Daniell's work, published by Mr. Headlam in 1846, was much modified by the extensive changes introduced by the English orders of May 8, 1845; and the third edition by the still more radical changes introduced by the order of April, 1850, the statute of 15 and 16 Vict. (ch. 86), and the general orders afterwards made under the authority of that statute. Of course, the subsequent editions of Daniell are still further removed from the standard adopted by this court in 1842; but as they contain a view of the later decisions bearing upon so much of the old system as remains, they have on that account a value of their own provided one is not misled by the new portions." But the practice of the English Court of Chancery affects only matters of procedure, and does not apply in determining questions of jurisdiction, which depend wholly on the constitution and laws of the United States.<sup>1</sup>

§ 4. Code practice in the United States.— Courts of chancery had existed in most of the American colonies prior to the Revolution,<sup>2</sup> and after that event they were established by the constitutions of many of the States upon the model of the High Court of Chancery in England. Such was the case in New York, New Jersey, Maryland, South Carolina and Mich-

<sup>1</sup> *Lewis v. Shainwald*, 48 Fed. Rep. 492.

<sup>2</sup> Laussat's note to 1 Fonblanque's Equity, 13; article in 18 Am. Law Rev. 226; Story's Eq. Jurisprudence, § 56; Bispham, Principles of Equity (4th ed.), § 14, n. The Connecticut General Assembly formerly took exclusive cognizance of all questions in equity, and the proceedings before them were without plea or answer

of any kind. *Broome v. Beers*, 6 Conn. 198. The practice of the courts has always tended to simplicity in matters of form. *Consolidated Presbyterian Soc. v. Staples*, 23 Conn. 544, 555. The Practice Act of 1879, after the manner of the New York code, abolishes the distinction between law and equity by providing for a single form of action called a complaint.



igan; and distinct courts of chancery now exist in New Jersey, Maryland, Kentucky, Delaware, Tennessee, Mississippi and Alabama.<sup>1</sup> Most of the other States have followed the example of New York, which State in 1848 not only abolished its court of chancery, but also the distinction between legal and equitable forms of action, substituting a general form of civil action in their place. The language of the New York code was as follows: — “The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished, and there shall be in this State but one form of action for the enforcement and protection of private rights and the redress of private wrongs, which shall be denominated a civil action.”<sup>2</sup> In discussing the effect of these changes a well-known writer says: — “The distinctions abolished are simply those which formerly existed between the two classes of actions in the manner of stating the facts, in the style of the writ, and the mode of submitting evidence; those which arise from the mode of trial and from the nature of the relief are as marked as before.”<sup>3</sup> Another learned author, speaking to the same point, says: — “The code has not changed the principles by which courts determine the rights, duties and liabilities of the parties to an action. They remain as before its adoption; therefore in stating a cause of action it must appear from the facts alleged that there is a liability of the defendant to the plaintiff, to enforce which he is entitled to invoke the aid of the court. To enforce or protect these rights, all remedies known either at law or in equity still remain to a party, and may be speedily applied by the court through the single civil action of the code.”<sup>4</sup>

<sup>1</sup> Bispham's Principles of Equity Jurisprudence (4th ed.), § 15.

<sup>2</sup> For an enumeration of the States which have adopted the radical provisions of the New York code, either literally or substantially, see Bliss on Code Pleading (2d ed.), § 5. For an account of the anomalous condition in Pennsylvania, where the common-law courts formerly exercised extensive equitable jurisdiction, see an article on “Administration of Equity

through Common-law Forms,” by Sydney J. Fisher, Esq., in 1 Law Quarterly Review, p. 455. See, also, “Chancery in Massachusetts,” by Edwin H. Woodruff, Esq., 5 Law Quarterly Review, p. 870.

<sup>3</sup> Bliss on Code Pleading (2d ed.), § 10.

<sup>4</sup> Maxwell on Code Pleading, p. 8. The distinction between actions at law and suits in equity under the code is also discussed and pointed

**§ 5. Federal practice in respect of cases involving legal and equitable claims.**—When a suit which involves both legal and equitable remedies is removed from the State to the federal courts, the pleadings must be recast and the causes of action stated according to the course of procedure on the law and equity sides of the court, respectively, and the causes separated and placed there;<sup>1</sup> and where several actions removed from a State court were based upon insurance policies upon the same property issued on the same application, at the same time, and by the same agent, containing a clause for contribution, the court, on motion of the defendants, ordered one of the causes to be transferred to the equity docket, and the other defendants to be made parties, and the pleadings in that case to be reformed according to the equity practice.<sup>2</sup> A pe-

out by Selden, J., in *Reubens v. Joel*, 18 N. Y. 488. See, also, *Mott v. Oppenheimer*, 185 N. Y. 816.

<sup>1</sup>18 U. S. St. at L., ch. 187, p. 470, and 24 U. S. St. at L., ch. 878; *Lacroix v. Lyons*, 27 Fed. Rep. 408; *Perkins v. Hendryx*, 28 Fed. Rep. 418; *Northern Pac. R. Co. v. Paine*, 119 U. S. 561; *La Mothe v. National Co.*, 15 Blatchf. 432. But if the complaint states substantially only one cause of action and that an equitable one the case need not be recast. *Phelps v. Elliott*, 26 Fed. Rep. 881. But the rule enforced in the circuit and district courts of the United States that a bill in equity to quiet title or remove clouds must show a legal and equitable title in the plaintiff, and set forth the facts and circumstances on which he relies for relief, does not apply to an action in the territorial court founded upon territorial statutes which unite legal and equitable remedies in one form of action. *Ely v. New Mexico &c. R. Co.*, 129 U. S. 291; *Parley's Park &c. Co. v. Kerr*, 180 U. S. 256, holding that the Process Act of 1792 does not forbid the consolidation of legal and equitable jurisdictions by acts of territorial

legislatures. See, also, *Hornbuckle v. Toomba*, 18 Wall. 648; *Hershfield v. Griffith*, 18 Wall. 657; *Davis v. Bilsland*, 18 Wall. 659; *Basey v. Gallagher*, 20 Wall. 670.

<sup>2</sup>*Falls of Neuse Mfg. Co. v. Georgia Home Ins. Co.*, 26 Fed. Rep. 1. The United States circuit court does not sit as a court of errors in a cause removed from a State court, but it has the same power to set aside or modify any interlocutory orders or decisions made in the State court as the latter would have had if the case had remained there, or as the circuit court itself would have had if the cause had originated therein. *Bryant v. Thompson*, 27 Fed. Rep. 881. In reversing a decree of the circuit court on the ground of adequate remedy at law in the State from which the case was removed, the Supreme Court said:—"We think the rule is settled in this court that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on State statutes or acts of congress, the jurisdiction of such cases, as between the law side and the equity side of the federal

tition praying for equitable relief was brought in a State where the union of legal and equitable causes of action in one suit was permitted, and an answer was filed seeking legal relief. The case was then removed to the United States circuit court. The plaintiff took a writ of error and an appeal from a judgment of that court for the defendant, and after hearing on the writ the Supreme Court reversed the judgment and remanded the case with directions to allow the plaintiff to amend his petition, and to strike out the answer of the defendant, proper motions to that effect having been made prior to the judgment below.<sup>1</sup>

**§ 6. Enforcement of new rights created by local law.—** Although the equity jurisdiction of the courts of the United States is subject to neither limitation nor restraint by the State authorities and is uniform throughout the different States of the Union;<sup>2</sup> and their general practice in equity is not affected by the laws of a State in which they sit,<sup>3</sup> yet

courts, must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction it must be held to apply to the other." *Van Norden v. Morton*, 99 U. S. 878.

<sup>1</sup> *Hurt v. Hollingsworth*, 100 U. S. 100. Notwithstanding the peculiarities of the civil code of Louisiana, distinctions between law and equity must be preserved in the federal courts, and equity cases from that circuit must go to the Supreme Court by appeal. If a petition for foreclosure of a mortgage is brought up by writ of error, it will be dismissed. *Walker v. Dreville*, 12 Wall. (1871), 440. See, also, *McCollum v. Eager*, 2 How. 6; *Scott v. Neely*, 140 U. S. 106; *Story v. Livingston*, 13 Pet. 859; *Gaines v. Relf*, 15 Pet. 9.

<sup>2</sup> *Gamewell Fire Alarm Tel. Co. v. Mayor &c.*, 81 Fed. Rep. 812; *Vincent v. County of Lincoln*, 80 Fed. Rep. 749, 759; *Lake Superior Iron Co. v.*

*Brown, Bonnell & Co.*, 44 Fed. Rep. 535, 542; *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. Rep. 151, 156. And there can be no enforcement in the federal courts of any rights created by State law, which impair the separation required in those courts between actions for legal demands and suits for equitable relief. *Scott v. Neely*, 140 U. S. 106; *Bennett v. Butterworth*, 11 How. 669. In the United States courts, if the remedy at law is speedy and adequate, a remedy in equity created by State statute cannot be resorted to because of the provisions of section 723 of the Revised Statutes, and of article 7 of the amendment to the constitution, guaranteeing the right of trial by jury. *Whitehead v. Entwhistle*, 27 Fed. Rep. 778.

<sup>3</sup> *Phelps v. Elliott*, 26 Fed. Rep. 881; *Russell v. Farley*, 105 U. S. 433; *Penn. R. Co. v. Allegheny Valley R. Co.*, 25 Fed. Rep. 115; *Dravo v. Fabel*, 25 Fed. Rep. 116. In the two cases last

when a State statute creates a right<sup>1</sup> and prescribes a mode of proceeding to enforce it in the State courts, the courts of the United States in that State will enforce the right, but not always in the mode prescribed by the State law. The State courts may be authorized to enforce an equitable right by an action at law or a legal demand by a suit in equity, or to confound the two jurisdictions in the same suit; whereas in the federal courts the distinction between legal and equitable modes of proceeding is strictly maintained. Nevertheless, "it is desirable, when a court of the United States is enforcing a right created by State statute, to follow as near as may be the practice prescribed by the State statute."<sup>2</sup>

§ 7. **Enforcement of State rules of property.**— Under the repeated decisions of the United States Supreme Court the right to redeem within a prescribed time after sale under a decree of foreclosure, given in many States by statute, is a substantial one, to be recognized in the courts of the United States, sitting in equity, because the statute constitutes a rule of property in the State that enacts it;<sup>3</sup> but if substantial

cited a statute provided for examination of the opposite party as if under cross-examination. *Gaines v. City of New Orleans*, 27 Fed. Rep. 411; *Burford v. Holley*, 28 Fed. Rep. 680; *Howth v. Owens*, 29 Fed. Rep. 722, 724.

<sup>1</sup> Even if it has no existence in the general jurisprudence of equity; as, for instance, the right given to a general creditor to file a creditor's bill and have a receiver appointed. *Fechheimer v. Baum*, 87 Fed. Rep. 167. See, also, *Flash v. Wilkerson*, 22 Fed. Rep. 689; *Tomlinson & Co. v. Shatto*, 34 Fed. Rep. 380.

<sup>2</sup> Per Caldwell, J., in *Leighton v. Young*, 10 U. S. App. 298, 310, 312. Propriety and convenience suggest that the State and federal practice should not materially differ when titles to land are the subjects of investigation. *Clark v. Smith*, 18 Pet. 195. See, also, *Lanier v. Alison*, 31

Fed. Rep. 100. The remedy must not be contrary to provisions of the federal constitution or acts of congress. *Whitehead v. Entwistle*, 27 Fed. Rep. 778.

<sup>3</sup> *Parker v. Dacres*, 180 U. S. 43; *Mason v. Northwestern Mut. L. Ins. Co.*, 106 U. S. 163; *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627; *Metropolitan Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 97 U. S. 73; *Orvis v. Powell*, 98 U. S. 176; *Swift v. Smith*, 102 U. S. 442; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51; *Jackson & Sharp Co. v. Burlington & C. R. Co.*, 29 Fed. Rep. 474. The statutes of Illinois giving the right to redeem mortgaged lands sold under decree did not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, personalty and franchises so mortgaged should be sold

effect is given to the right of redemption, the federal courts are at liberty in so doing to adhere to their own modes of proceeding.<sup>1</sup> So the order in which real estate which has been mortgaged and subsequently sold at different times to different purchasers shall be subjected to satisfaction of the mortgage is, where the rule is established by State statute or the decisions of the State courts, a rule of property which will be followed by the federal courts.<sup>2</sup> Under the same head is a State statute imposing an individual liability on stockholders of a corporation,<sup>3</sup> and the settled law of a State in respect of questions relating to chattel mortgages.<sup>4</sup> It has also been held that the proper method of proceeding against infant defendants, whether by general guardian or guardian *ad litem*, is a question local to the law of the jurisdiction.<sup>5</sup>

§ 8. Effect of local laws further considered.— The following are some of the instances in which the United States have declined to follow the State practice: A personal decree against an infant after guardian *ad litem* had been appointed, in a suit not involving property, was declared to be void, even in collateral proceedings, if no actual service of process was made on the infant.<sup>6</sup> The condition of an injunction bond

as an entirety and without the right of redemption given by statute. *Hammock v. Farmers' Loan & Trust Co.*, 105 U. S. 77. A rule of property established by the decisions of a State court binds the federal courts sitting in that State as much as if it were part of a statute. *Lippincott v. Mitchell*, 94 U. S. (1877), 767.

<sup>1</sup> *Allis v. Northwestern Mut. L. Ins. Co.*, 97 U. S. 144; *Conn. Mut. L. Ins. Co. v. Cushman*, 106 U. S. 51.

<sup>2</sup> *Orvis v. Powell*, 98 U. S. 176.

<sup>3</sup> *Borland v. Haven*, 87 Fed. Rep. 394.

<sup>4</sup> *Etheridge v. Sperry*, 139 U. S. 267.

<sup>5</sup> *Colt v. Colt*, 111 U. S. (1884), 566.

For other instances of a similar nature, see *Cummings v. National Bank*, 101 U. S. 153; *Davis v. James*, 2 Fed. Rep. 618; *Fitch v. Creighton*, 24 How. 159; *Clark v. Smith*, 18 Pet. 195;

*Holland v. Challen*, 101 U. S. 15; *Broderick's Will*, 21 Wall. 503. The statute of Michigan requiring the general guardian of an infant "to appear and represent his ward in all legal suits and proceedings" does not dispense with the necessity of actual service of process upon the infant in a case in a United States court where a personal decree alone is sought. *New York Life Ins. Co. v. Bangs*, 103 U. S. 435.

<sup>6</sup> "The statute of Michigan requiring the general guardian of an infant to 'appear for and represent his ward in all legal suits and proceedings unless when another person is appointed for the purpose as guardian or next friend,' does not change the necessity of service of process upon the defendants in a case before a court of the United States where a

taken by the federal courts must conform to the established principles of equity by which they are governed, and cannot be extended to conform to the law of the State in which the court is sitting.<sup>1</sup> In regular equity proceedings where the defendant in possession in a suit for partition seeks compensation for improvements, his claim must be set up by cross-bill, but by the course of practice in Ohio this is not necessary. It was contended, in effect, that this was a rule of property binding on the federal courts, but the United States court, while recognizing all rights secured by the statutes of Ohio to tenants in common, refused to conform to the form and mode of securing these rights prescribed by those statutes.<sup>2</sup>

**§ 9. Practice in proceedings between States.**—Proceedings between States in the United States Supreme Court to establish boundaries are regulated by the rules and usages of the court of chancery, moulded to suit the peculiar character

personal contract alone is involved. It may be otherwise in the State courts, . . . but the State law cannot determine for the federal courts what shall be deemed sufficient service of process or sufficient appearance of parties." *New York L. Ins. Co. v. Bangs*, 108 U. S. 435.

<sup>1</sup> *Bein v. Heath*, 12 How. 168, holding also that the rule authorizing the circuit court, both judges concurring, to modify the process and practice in their respective districts, applies only to forms of proceedings and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond.

<sup>2</sup> "The right may be substantially secured by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt in conformity with the practice of the federal courts. See *Brine v. Ins. Co.*, 96 U. S. 627, and *Ins. Co. v. Cushman*, 108 U. S. 61; s. c., S. Ct. Rep. 236,

where it is also said that there is no doubt of the power of the federal court to adopt its own modes and methods for the enforcement of the rights given by the local law, but that the particular mode prescribed by the local law is not of the substance of the right. The mode or manner of ascertaining and securing the right belongs, so far as the federal court is concerned, to the domain of practice, and the power to regulate the practice in harmony with the laws of the United States and the rules of the Supreme Court is expressly given by statute to the circuit court. Rev. St. U. S., § 918. See, also, *Allis v. Ins. Co.*, 97 U. S. 144." *McClaskey v. Barr*, 48 Fed. Rep. 190, 136. See, also, *Matthews v. Warner*, 6 Fed. Rep. 461; *Russell v. Farley*, 105 U. S. 437; *Myers v. Block*, 120 U. S. 206, 211; *Phelps v. O'Brien County*, 2 Dill. 518; *Gordon v. Hobart*, 2 Sumner, 401; *Dow v. Chamberlin*, 5 McLean, 281; *Marchand v. Sabral*, 24 Fed. Rep. 316.



of the case.<sup>1</sup> Thus the rules which govern courts of equity as to allowance of time for filing an answer and other proceedings in suits between individuals are not applied in such controversies. The parties must, in the nature of things, be incapable of acting with the promptness of an individual.<sup>2</sup> In a bill filed in the Supreme Court of the United States by the State of Florida against the State of Georgia to establish a boundary between them, the attorney-general filed an information and moved to intervene on behalf of the United States, it was held that he might so intervene, adduce evidence written and parol, examine witnesses and be heard on the argument without making the United States a party in the technical sense of the term. He would have no right to interfere in the pleading, evidence or admissions of the States, or of either of them.<sup>3</sup>

§ 10. **Equity practice in New Jersey.**—The rule which governs the chancery practice in the New Jersey court of chancery was declared in a recent decision of that tribunal. “In the absence of statutory regulation, or an independent practice, this court follows the practice of the English Court of Chancery, and the rule of practice of that court is in such a case the law of this court; and under like circumstances the court of errors and appeals follows the practice of the House of Lords in England.”<sup>4</sup> The court of errors and appeals also said, in discussing what constitutes an appealable order or decree:—“In the absence of modifications arising from statute or an established course of proceeding, the practice of this.

<sup>1</sup> *Rhode Island v. Massachusetts*, 14 Pet. (1840), 210; *Florida v. Georgia*, 17 How. 478.

<sup>2</sup> *Rhode Island v. Massachusetts*, 18 Pet. (1839), 23.

<sup>3</sup> *Florida v. Georgia*, 17 How. (1855), 478.

<sup>4</sup> *Southern Nat. Bank v. Darling*, 49 N. J. Eq. 398. Provided, . . . “it does not violate the spirit of our statutory regulations,” said the chancellor in *West v. Paige*, 9 N. J. Eq. 208. See, also, *Morris v. Taylor*, 23 N. J. Eq. 134; *Ratzer v. Ratzer*, 29 N. J.

Eq. 162. The ordinances of Lord Cornbury and of Governor Franklin provided that the court of chancery established in the province or colony of New Jersey shall hear and determine all causes and suits, as near as may be, according to the usage and custom of the High Court of Chancery in the Kingdom of England. *Jones v. Davenport* (1889), 45 N. J. Eq. 77, 82. Therefore exceptions to an answer must be signed by counsel. *Hitchcock v. Rhodes* (1887), 42 N. J. Eq. 495.



court is in conformity with that of the House of Lords. With the exceptions mentioned the established English routine is the law of this court; and such law is as obligatory, until altered by statute, as are any of the general principles of the common law. I think it undeniable that, with the above reservation, every decree or order which could have been appealed to parliament at the time of the American Revolution can be appealed to this court.”<sup>1</sup>

<sup>1</sup>Newark &c. R. Co. v. Mayor of Newark (1872), 23 N. J. Eq. 515, 517.

## CHAPTER II.

### JURISDICTION.

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| <p>§ 11. Definitions.</p> <p>12. General limitation of equitable jurisdiction.</p> <p>13. Objection of adequate remedy at law.</p> <p>14. The same subject continued.</p> <p>15. Federal jurisdiction exempt from State control.</p> <p>16. Judges' chambers.</p> <p>17. Jurisdictional amount inherent in the court of chancery.</p> <p>18. Jurisdictional amount by statute.</p> <p>19. The same subject continued.</p> <p>20. Original jurisdiction of the United States Supreme Court.</p> <p>21. Appellate jurisdiction of the United States Supreme Court.</p> <p>22. The same subject continued — Review of decisions of State courts.</p> <p>23. Jurisdiction of the United States circuit court of appeals.</p> <p>24. Suits "arising under the constitution or laws of the United States."</p> | <p>§ 25. The same subject continued.</p> <p>26. Equitable jurisdiction of the United States district courts.</p> <p>27. Conflict between federal and State jurisdictions.</p> <p>28. Jurisdiction as dependent upon citizenship.</p> <p>29. The same subject continued.</p> <p>30. Change of citizenship.</p> <p>31. Citizenship of corporations.</p> <p>32. Citizenship of persons suing in a representative capacity.</p> <p>33. Objections on the ground of citizenship.</p> <p>34. Ancillary jurisdiction of the federal courts.</p> <p>35. The same subject continued — Supplemental and cross-bills.</p> <p>36. Jurisdiction by residence.</p> <p>37. Residence of corporations.</p> <p>38. The same subject continued — Waiver of objections.</p> <p>39. Suits by assignees.</p> |
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§ 11. Definitions.— Jurisdiction is comprehensively defined to be the authority of a court or judge to entertain an action, petition or other proceeding, to decide the same, and to carry such decision into execution.<sup>1</sup> The jurisdiction of a court may be original or appellate, and in some instances the same court exercises both jurisdictions. A court is said to have original jurisdiction of a suit when it may be commenced or *originated* in that court. Appellate jurisdiction is the power of a court to adjudicate a case not commenced in it but transferred to it by appeal, writ of error, *certiorari* or other process from an-

<sup>1</sup> Caruther's "History of a Lawsuit" (3d ed.), § 1.

other tribunal. The original jurisdiction of a court may be either *exclusive* or *concurrent*. When a proceeding in respect of a certain subject-matter can only be brought in one court that court is said to have *exclusive* jurisdiction; when it can be brought in any one of several courts they are said to have *concurrent* jurisdiction. When the jurisdiction of a court is limited by the amount or value of the property in litigation it is called a court of limited jurisdiction; when it is not embarrassed by such restrictions it is called a court of *general* jurisdiction. Territorial jurisdiction signifies the district or geographical limits within which the court may exercise the jurisdiction or power conferred upon it by law.<sup>1</sup>

§ 12. General limitation of equitable jurisdiction.—It is not within the province of this work to discuss or enumerate the rights which may be enforced by proceedings in equity; that is the appropriate function of a treatise on equity jurisprudence.<sup>2</sup> The cardinal rule of equity that jurisdiction will

<sup>1</sup> Caruther's "History of a Law-suit" (8d ed.), § 2.

<sup>2</sup> See Beach on Modern Equity Jurisprudence, *passim*. "To give a court of equity jurisdiction," as was said by Justice Woods in *Fussell v. Gregg*, 118 U. S. 550, 554, "the nature of the relief asked must be equitable, even when the suit is based on an equitable title." This rule was applied in *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, where it was said to be entitled to special consideration from the courts of the United States. See, also, *Smith v. Bourbon County*, 127 U. S. 105. In 1 Spence, 822, note, the author quotes from Professor Millar as saying:—"Law and equity are in continued progression and the former is constantly gaining ground upon the latter. Every new and extraordinary interposition is by length of time converted into an old rule. A great part of what is now strict law was formerly considered as equity;

and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." See, also, *Ex parte Boyd*, 105 U. S. 647, 658. On the other hand Judge Dillon says:—"The temptation to supply serious defects and *lacunæ* which experience from time to time discloses in common-law remedies, by a judicial extension of the principles of equity jurisprudence, so as to secure justice or prevent its failure, is always strong, and on the whole resistless. A conservative chancellor may say, 'I have no power—the case is one for the legislature;' but the natural and general tendency, when such a course is not contrary to existing legislation or policy, is to assert in the particular case a power felt to be necessary, and whose exercise promises to be beneficial. This, it is true, is judiciary law; but it is law which is necessarily evolved in the very process of legal administration. So it has been in the past, and so from

not be entertained where there is an adequate remedy at law<sup>1</sup> is frequently re-enforced by express statutory provision. Thus, the federal judiciary act of 1789 enacts that "suits in equity shall not be sustained in either of the courts of the United States where a plain, adequate and complete remedy may be had at law." Under this provision the test of equitable jurisdiction is that which existed when the act was passed, unless subsequently changed by act of congress.<sup>2</sup>

**§ 13. Objection of adequate remedy at law.**—The objection that the plaintiff has an adequate remedy at law should be raised by demurrer or by plea or should be distinctly stated in the answer of the defendant.<sup>3</sup> It comes too late at

the very nature of the case it must continue in the future. Law thus originating in actual experience, and limited by the judges in its application to the exigency which calls it into existence, must on the whole be excellent, though likely to be incomplete." 1 Dillon on Municipal Corporations (4th ed.), § 275, n. 1.

<sup>1</sup> 1 Beach on Modern Equity Jurisprudence, § 2, and cases there cited. A bill for damages for breach of contract is entirely foreign to equity jurisdiction; and, although the parties stipulate to waive the question of jurisdiction, the court may of its own motion dismiss the bill. *Richards v. Lake Shore &c. Ry. Co.*, 124 Ill. 516; s. c., 16 N. E. Rep. 909.

<sup>2</sup> *McConihay v. Wright*, 121 U. S. 201, 206. Accordingly the Supreme Court, in view of the practice of the English court of chancery at that period, has power to award or refuse costs. *Pennsylvania v. Wheeling &c. Bridge Co.*, 18 How. 460. The provision in the code of Iowa that "an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title

thereto, though not in possession," although construed by the courts of that State as authorizing a suit in equity to recover possession of real estate from the occupant in possession of it, does not enlarge the equity jurisdiction of federal courts in that State, so as to give them jurisdiction over a suit in equity in a case where a plain, adequate and complete remedy may be had at law. *Whitehead v. Shattuck*, 138 U. S. 146; s. c., 11 S. Ct. Rep. 276, explaining and distinguishing *Holland v. Challen*, 110 U. S. 15; s. c., 8 S. Ct. Rep. 495, and *Reynolds v. National Bank*, 112 U. S. 405; s. c., 5 S. Ct. Rep. 218. If the court finds on examining the proofs nothing which makes a proper case for equity, it is its duty to recognize the fact and to give it effect, though not raised by the pleadings nor suggested by counsel. *Allen v. Pullman's Car Co.*, 139 U. S. 658.

<sup>3</sup> *Brown v. Lake Superior Iron Co.*, 134 U. S. 530; *Reynes v. Dumont*, 130 U. S. 354; *Kilbourn v. Sunderland*, 130 U. S. 505; *Wylie v. Coxe*, 13 How. 417; *Lynch v. Williams*, 6 Johns. Ch. 342; *Grandin v. Le Roy*, 2 Paige, 509; *Colton v. Ross*, 2 Paige, 396; *Wiswall v. Hall*, 3 Paige, 813; *Holmes v. Dole*, *Clarke's Ch.* 71;

a hearing on the merits where the court has jurisdiction of the parties and the subject-matter.<sup>1</sup>

*Kobbi v. Underhill*, 8 Sandf. Ch. 277; *Russell v. Loring*, 8 Allen, 121; *Kelley v. Kelley* (Wis.), 50 N. W. Rep. 384. It is preferable to take the objection by demurrer if it appears on the face of the bill, otherwise by plea or answer. *Consolidated Roller-mill Co. v. Coombs*, 89 Fed. Rep. 25. It seems that under the New York Code of Civil Procedure it is necessary to take the objection by answer; at least if a general answer is filed the objection is waived. *Ostrander v. Weber*, 114 N. Y. 95; s. c., 21 N. E. Rep. 112; *Cass v. Cass*, 16 N. Y. Supl. 229; *Baron v. Korn*, 51 Hun, 401; *Truscott v. King*, 6 N. Y. 147; *Cox v. James*, 45 N. Y. 557; *Green v. Milbank*, 8 Abb. N. C. 138; *Pam v. Vilmer*, 54 How. Pr. 235. And where the complaint alleges the lack of an adequate remedy at law, with the reasons for it, and the answer takes issue on the merits, this is a waiver of objection to the jurisdiction on that ground, which is not covered by an objection that the complaint does not state a cause of action. *Town of Mentz v. Cook*, 108 N. Y. 504; s. c., 15 N. E. Rep. 541. Filing a cross-bill is a waiver. *Salé v. McLean*, 29 Ark. 612. The objection is waived where defendant, instead of pleading want of jurisdiction on the ground that plaintiff has a remedy at law, merely protests against the jurisdiction and asks affirmative equitable relief. *Snowden v. Tyler*, 21 Neb. 199. In Wisconsin, at least, the objection may be raised by demurrer *ore tenus* (*Stein v. Benedict* (Wis.), 58 N. W. Rep. 891, 895; *Trustees v. Kilbourn*, 74 Wis. 452; s. c., 43 N. W. Rep. 168, and cases there cited; *Avery v. Ryan*, 74 Wis. 599; s. c., 43 N. W. Rep. 317; *Denner v. Railway*

*Co.*, 57 Wis. 218; s. c., 15 N. W. Rep. 158); but not by demurrer *ore tenus* after answer to the merits. *Sherry v. Smith*, 72 Wis. 339; s. c., 39 N. W. Rep. 556. It comes too late if not made until after filing a general answer. *Tarbell v. Bowman*, 108 Mass. 341. Or if taken in an answer filed by the defendant after he has appeared, without objection to the jurisdiction, at a hearing appointing a receiver and ordering a sale of the property, and also at a hearing before a master. *Jones v. Keen*, 115 Mass. 170. And where a demurrer on the ground of adequate remedy at law was joined to the answer, but the case was heard and reserved upon the pleadings and facts agreed, without objection, it was held that it could not be taken before the full court. *Page v. Young*, 106 Mass. 313. And where, with his demurrer to a bill to recover unliquidated damages, defendant filed a stipulation waiving objections to the jurisdiction on the ground of there being a remedy at law, but reserved all other defenses, the stipulation was held to be repugnant to the demurrer, and as such properly disregarded, the demurrer sustained, and the bill dismissed for want of equity. *Sheldon, C. J.*, dissenting. *Richards v. Lake Shore & C. Ry. Co.*, 124 Ill. 516; s. c., 16 N. E. Rep. 909.

<sup>1</sup> *Sherry v. Smith*, 72 Wis. 339; s. c., 39 N. W. Rep. 556; *Lehigh Zinc & Iron Co. v. Trotter*, 43 N. J. Eq. 185, 204; *Cutting v. Dana*, 25 N. J. Eq. 265; *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396, 407; *Bates v. Conrow*, 11 N. J. Eq. 187; *Clark v. Flint*, 22 Pick. 231; *Crocker v. Dillon*, 133 Mass. 92; *Creely v. Bay State Brick Co.*, 103 Mass. 514; *Russell v. Loring*, 8 Allen,

§ 14. **The same subject continued.**—But where the case is one in which it is not competent for the court to grant the only relief asked, the remedy being at law,<sup>1</sup> or it appears

121, where a case was submitted upon a statement of facts; Consolidated Roller-mill Co. v. Coombs, 39 Fed. Rep. 25; Kilbourn v. Sunderland, 130 U. S. 505; s. c., 9 S. Ct. Rep. 594; Kobbi v. Underhill, 3 Sandf. Ch. 277; Hays v. Currie, 3 Sandf. Ch. 585, 591; Holmes v. Dole, Clarke's Ch. 71; Cumming v. Mayor &c., 11 Paige, 596; Le Roy v. Platt, 4 Paige, 77; Wiswall v. Hall, 3 Paige, 813; Grandin v. Le Roy, 2 Paige, 509; Livingston v. Livingston, 4 Johns. Ch. 287; Underhill v. Van Cortlandt, 2 Johns. Ch. 339; Ostrander v. Weber, 114 N. Y. 95; s. c., 21 N. E. Rep. 112; Baron v. Korn, 51 Hun, 401; s. c., 27 N. E. Rep. 804; affirming s. c., 4 N. Y. Supl. 334; Cass v. Cass, 16 N. Y. Supl. 229; St. Paul &c. R. Co. v. Robinson, 41 Minn. 394; s. c., 43 N. W. Rep. 75; Newton v. Newton, 46 Minn. 33; s. c., 48 N. W. Rep. 450; McVey v. Manatt, 80 Iowa, 132; s. c., 45 N. W. Rep. 548; Smith v. Lawrence, 26 Conn. 469, 479; Niles v. Williams, 24 Conn. 279; Russell v. Green, 10 Conn. 269, 276; Brewster v. Colegrove, 46 Conn. 105; Hine v. New Haven, 40 Conn. 478; City of Chicago v. Cameron, 22 Ill. App. 91. See, also, Tenney v. Bank, 20 Wis. 152; Peck v. School Dist., 21 Wis. 517; Sherman v. Kreul, 42 Wis. 38; Boorman v. Sunnuchs, 42 Wis. 233. It comes too late when made after answer by way of exception to the master's report, Crawford v. Schmitz (Ill.), 29 N. E. Rep. 40; or on a hearing before the master, Parker v. Nickerson, 137 Mass. 487), or in the appellate court, Reynes v. Dumont, 103 U. S. 354; Brown v. Lake Superior Iron Co., 134 U. S. 530; Mowry v. Hawkins, 57 Conn. 453; Cosby v.

Buchanan, 23 Wall. 420, where the case had been pending for thirty-six years. See, also, Dearth v. Hide & Leather Nat. Bank, 100 Mass. 540. When, by an allegation of mistake, the defendant had the action tried in equity, but the evidence did not support the allegation, the plaintiff acquiescing below could not object on appeal. Bourne v. Bourne (Ky.), 17 S. W. Rep. 443. Where a party submits to the jurisdiction of a court of equity, and takes his chances of a decree in his favor, his objection on appeal that the remedy was at law will not avail, unless the want of jurisdiction is so plain that the court would be justified in dismissing the bill of its own motion. Edgett v. Douglass (Pa.), 22 Atl. Rep. 868. See, also, Evans v. Goodwin, 132 Pa. St. 136, and cf. Jinks v. Banner Lodge, 189 Pa. St. 414. In an action for damages for breach of a contract to exchange lands, the answer prayed that, in case the court should adjudge plaintiff's title to its lands to be good, so that defendant was bound to accept a conveyance of them, it decree a specific performance. It was held that the defendant could not complain that the court tried and decided the action as one for a specific performance. Mealey v. Finnegan (Minn.), 49 N. W. Rep. 207.

<sup>1</sup> Mills v. Knapp, 39 Fed. Rep. 592, where the plaintiff declared in his bill that he was entitled to recover an exact sum, but asked no discovery and showed that no accounting was necessary under the direction of the court. See, also, Grandin v. Le Roy, 2 Paige, 509; Arnold v. Middletown, 39 Conn. 401.

that chancery has not under any circumstances jurisdiction of the subject of the bill,<sup>1</sup> the court will entertain the objection at any stage of the case, or, *sua sponte*, dismiss the bill.<sup>2</sup>

§ 15. Federal jurisdiction exempt from State control.—The equity jurisdiction of the courts of the United States is

<sup>1</sup> *Niles v. Williams*, 24 Conn. 279; *Smith v. Lawrence*, 26 Conn. 469, 479.

<sup>2</sup> *Magee v. Magee*, 51 Ill. 500; *Stout v. Cook*, 41 Ill. 447; *Charleston Ins. Co. v. Porter*, 3 Desausa. 6; *Woodman v. Freeman*, 25 Me. 531; *Tubb v. Fort*, 58 Ala. 277; *Hart v. Mallet*, 2 Hayw. 136; *Stone v. Thomas*, L. R. 5 Ch. 219. (*Cf. Morley v. White*, L. R. 8 Ch. 731.) An objection for want of jurisdiction, another court having exclusive jurisdiction by statute or otherwise, will be taken by the court itself at any stage of the case. *Heyer v. Burger*, Hoff. Ch. 1. Where the objection of adequate remedy at law was not made by demurrer, plea or answer, nor suggested by counsel, nevertheless if it clearly exists it is the duty of the court, *sua sponte*, to recognize it and dismiss the bill. *Lewis v. Cocks*, 23 Wall. 466; *Parker v. Winnipiseogee Lake &c. Co.*, 2 Black, 545; *Oelrichs v. Williams*, 15 Wall. 211; *Killian v. Ebbinghaus*, 110 U. S. 568; *Hine v. New Haven*, 40 Conn. 478. See, also, *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658; *Keokuk &c. Ry. Co. v. Donnell*, 77 Iowa, 221; s. c., 42 N. W. Rep. 176; *Appeal of Pittsburg &c. Drove-Yard Co.*, 123 Pa. St. 250; s. c., 28 W. N. C. 89. "While the court in its discretion, at the hearing, may dismiss a bill for want of such jurisdiction as is necessary, according to the rules usually adopted, yet, if the defendant submits to the jurisdiction, and does not raise the objection by demurrer or in his answer, he cannot insist upon it as a matter of right

unless the court is wholly incompetent to grant the relief sought by the bill." *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396, 407. The rule in Virginia is possibly more pronounced. The doctrine is there said to be well established that "if a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing though no objection has been taken to the jurisdiction in the pleadings, and that objection on that ground may be made at any time and in any court." *Buffalo v. Town of Pocahontas*, 85 Va. 223; s. c., 7 S. E. Rep. 238; *Morgan v. Carson*, 7 Leigh, 238; *Hudson v. Kline*, 9 Gratt. 379; *Green v. Massie*, 21 Gratt. 356; *Graveley v. Graveley's Adm'r*, 84 Va. 145; s. c., 4 S. E. Rep. 218; *Poindexter v. Burwell*, 82 Va. 507; *Salamone v. Keiley*, 80 Va. 86. And the Supreme Court of Missouri said:—"Our conclusion is that under our practice act the plea of remedy at law in a suit in equity is unknown. It has no place under our system of pleading. What we said upon this subject in the case of *Blair v. Railroad Co.*, 89 Mo. 388, and in *Shickle v. Watts*, 94 Mo. 419, is overruled." *Humphreys v. Atlantic Milling Co.*, 98 Mo. 542, 553; s. c., 10 S. W. Rep. 140, holding that "if the petition be one in equity, and at the hearing the plaintiff fails to show a case in which he is entitled to any equitable relief, the petition should be dismissed." Citing further *State v. St. Louis Circuit Court*, 41 Mo. 574; *Rutherford v. Williams*, 42 Mo. 18. And see *Story's Equity Pleading* (10th ed.), § 478, n.



subject to neither limitation nor restraint by State legislation and is uniform throughout the different States of the Union.<sup>1</sup> Thus, a State law giving exclusive jurisdiction to the probate court of certain suits against an administrator cannot prevent the United States courts from exercising jurisdiction.<sup>2</sup>

§ 16. Judges' chambers.—No such places as chambers for the judges of the United States circuit court or circuit justices are mentioned in the statutes. They do not appear to have any local habitation. "All business done out of court by the judge is called 'chamber business.' But it is not necessary to be done in what is usually called 'chambers.' Chamber business may be, and often is done, on the street, in the judge's own home, at the hotel where he stops when absent from home, or it may be done *in transitu*, on the cars in going from one place to another, within the proper jurisdiction to hold court. . . . The chambers of a judge as a legal entity are something of a myth. For the purposes of jurisdiction the chambers of a judge are wherever he happens to be in his circuit or district when the exigencies of the case call for the transaction of chamber business."<sup>3</sup>

<sup>1</sup>*Gamewell Fire Alarm Tel. Co. v. Mayor &c.*, 31 Fed. Rep. 312; *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. Rep. 151, 155; *Vincent v. County of Lincoln*, 80 Fed. Rep. 749, 754; *Lake Superior Iron Co. v. Brown, Bonnell & Co.*, 44 Fed. Rep. 539, 542; *United States v. Howland*, 4 Wheat. 108, 115; *Payne v. Hook*, 7 Wall. 480; *Green v. Creighton*, 28 How. 105. That new rights created by a State may be enforced by the federal courts in equity, see §§ 8, 10, *supra*.

<sup>2</sup>*Semmes v. Whitney*, 50 Fed. Rep. 666.

<sup>3</sup>*Sawyer, J.*, in *In re Neagle*, 39 Fed. Rep. 833, 855, 856, where he says that a circuit justice might lawfully (within his district) issue a temporary injunction, grant a writ of *habeas corpus*, an order to show cause, or do any other chamber business for the district in a railroad station dining-

room, or in the cars, as well as at his chambers in the court-house, or in the court-room; that he could make a writ of *habeas corpus* returnable before himself on the car and lawfully hear and decide the case while on his passage to the place for opening court. "The chambers of a judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the judge and to suitors—places where the judge at proper times can be readily found and the business conveniently transacted." S. C., 856. The constitution of Ohio provides that "the several judges of the Supreme Court . . . shall respectively have and exercise such power and jurisdiction at chambers or otherwise as may be directed by law." It was held that under this provision the legislature could not confer on a judge of the

**§ 17. Jurisdictional amount inherent in the court of chancery.**—Lord Bacon's ordinance declaring that all suits under the value of £10 shall be dismissed is in force in New Jersey, and where the amount in dispute is less than \$50 the suit is dismissed regardless of its merits.<sup>1</sup> The same rule was enforced in the New York court of chancery when it existed.<sup>2</sup> That court did not refuse to take cognizance of a cause where the amount in controversy appeared to be more than £10 although less than \$50.<sup>3</sup> The defendant can avail himself of the insignificance of the suit only by the pleadings on his part, unless the objection appears affirmatively on the face of the bill, in which case he may demur or move to dismiss on notice.<sup>4</sup>

Supreme Court jurisdiction at chambers to grant or dissolve an injunction in a cause pending in another court. "Jurisdiction at chambers is incidental to and grows out of the jurisdiction of the court itself. It is the power to hear and determine, out of court, such questions arising between the parties to a controversy, as might well be determined by the court itself, but which the legislature has seen fit to intrust to the judgment of a single judge, out of court, without requiring them to be brought before the court in actual session. It follows that the jurisdiction of a judge at chambers cannot go beyond the jurisdiction of the court to which he belongs, or extend to matters with which his court has nothing to do." *Pittsburg &c. Ry. Co. v. Hurd*, 17 Ohio St. 144, 146.

<sup>1</sup> *Allen v. Demarest* (1886), 41 N. J. Eq. 162, "except in special cases," which in England are said to be "such as in cases of charity, in cases of fraud, and in cases of bills to establish a right of a permanent nature; such as in the case of six shillings claimed to be due as an Easter offering, or of a perpetual rent charge of five shillings." Story's Equity Plead-

ing, § 500. And as to similar possible exceptions in this country see *Lufkin v. Galveston*, 73 Tex. 840; *Treadwell v. Patterson*, 51 Cal. 637. The rule is still enforced in the Chancery Division in England. *Westbury-on-Severn R. S. Authority v. Meredith*, 30 Ch. D. 887.

<sup>2</sup> *Fullerton v. Jackson* (1821), 5 Johns Ch. 276, where the requisite amount was referred to as \$50; *Moore v. Lyttle*, 4 Johns. Ch. 188, where it was said to be "ten pounds."

<sup>3</sup> *Vredenberg v. Johnson*, Hopk. Ch. 112.

<sup>4</sup> *Bradt v. Kirkpatrick*, 7 Paige, 62; *Allen v. Demarest*, 41 N. J. Eq. 162, 167; *Swedesborough Church v. Shivers*, 16 N. J. Eq. 458. Or, according to *Smets v. Williams*, 4 Paige, 864, if the fact do not appear on the face of the bill it may be pleaded in bar. The earlier case of *Moore v. Lyttle*, 4 Johns Ch. 188, leaves it doubtful whether the court would notice the objection unless attention were called to it by the defendant; but in the New Jersey cases *supra*, the court declared itself at liberty to dismiss the bill *sua sponte* at the hearing; and this seems to be the English rule. *Brace v. Taylor*, 2 Atk. 253;

**§ 18. Jurisdictional amount by statute.**—The statute prescribing the jurisdiction of the United States circuit courts, so far as it relates to the amount in controversy, confers jurisdiction “where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000.”<sup>1</sup> The appellate jurisdiction of the United States Supreme Court was likewise limited in certain cases to appeals from decrees wherein the matter in dispute, exclusive of costs, exceeded \$5,000.<sup>2</sup> The amount actually due at the time the action is commenced is the matter in dispute, and the rule is well-nigh universal that if the court has jurisdiction when the suit is begun it has it for all time. Thus, the court will not disregard a sum claimed in fixing the jurisdictional amount because the defendant in his answer admits it to be due and offers to pay it.<sup>3</sup> Furthermore, on appeals to the Supreme Court the matter in dispute is “the matter which is directly in dispute in the particular case in which the judgment or decree sought to be reviewed has been rendered,” and the court is not permitted, “for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties.”<sup>4</sup> But the fact of a valid defense to a cause of action

Cooper's Equity Pleading, 166; Story's Equity Pleading, § 500, n. In *Cummings v. Barrett*, 10 Cush. 186, 190, the court said:—“The powers of a court of equity are not to be called into exercise to consider matters of trifling amount or to recover nominal damages. The rule *de minimis* is applied in equity with reasonable strictness. In New York the rule is that a suit in equity will not be maintained when the amount is less than \$100 (statute enacted subsequent to the New York cases cited in the foregoing notes). No such statute exists here, but a similar principle is applied.” See, also, *Smith v. Williams*, 116 Mass. 510, 513; *Chapman v. Banker & Tradesman Publishing Co.*, 128 Mass. 478, the latter case holding that the court will decline to entertain a suit beneath its jurisdic-

tion although the defendants make no specific objection on this ground by demurrer or otherwise; *Gale v. Nickerson*, 151 Mass. 428; *Wood v. Wood*, 8 Ala. 756; *Steinbach v. Hill*, 25 Mich. 78; *Carr v. Inglehart*, 8 Ohio St. 457.

<sup>1</sup> Act of March 3, 1887, § 1 (24 U. S. St. at L., ch. 373, p. 552).

<sup>2</sup> U. S. Rev. St. §§ 691, 692.

<sup>3</sup> *Fuller v. Met. L. Ins. Co.*, 87 Fed. Rep. 168. On the point that the amount must be actually due, see, however, *Schunk v. Moline*, 147 U. S. 500, 505.

<sup>4</sup> *Elgin v. Marshall*, 106 U. S. 578; *Bruce v. Manchester & Co. R. Co.*, 117 U. S. 514. “The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him.” *Ross v. Pren-*

apparent on the face of the bill does not diminish the amount that is claimed, nor determine what is the matter in dispute; "for who can say in advance that that defense will be pre-

tiss, 3 How. 771, 772. In *Elgin v. Marshall*, *supra*, Mr. Justice Matthews said:—"The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and for that reason excludes the jurisdiction of this court in cases which involve rights that because they are priceless have no measure in money. *Lee v. Lee*, 8 Pet. 44; *Barry v. Mercein*, 5 How. 108; *Pratt v. Fitzhugh*, 1 Black, 271; *Sparrow v. Strong*, 3 Wall. 97. But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions. Undoubtedly congress in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. Ordinarily it would appear in the pleadings and judgment, where the claim must be stated and determined; but where the recovery of specific property, real or personal, is sought, affidavits of value were permitted from the beginning as a suitable mode of ascertaining the fact and bringing it upon the record. *Williamson v. Kincaid*, 4 Dall. 20; *Course v. Stead*, 4 Dall. 22; *United States v. Brig Union*, 4 Cranch, 216. But the fact of value in excess of the limit must affirmatively appear in the record as thus constituted, as it is essential to the existence and exercise of jurisdiction. This court will not proceed in any case unless

the right and duty to do so are apparent upon the face of the record. The language of the rule limits by its own force the required value to the matter in dispute in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes by a necessary implication any estimate of value as to any matter not actually the subject of that litigation. It would be clearly a violation of the rule to add to the value of the matter determined any estimate in money by reason of the probative force of the judgment itself in some subsequent proceeding.

. . . It is not the actual value of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal or apparent sum or value of the subject-matter of the judgment. . . .

Indeed so strictly has [the rule] been applied that in cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless if there are several and separate interests in that sum belonging to distinct parties, and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court has been constantly denied. *Ex parte Baltimore & Co. R. Co.*, 106 U. S. 5; *Schwed v. Smith*, 106 U. S. 188; *Farmers' L. & T. A. v. Waterman*, 106 U. S. 265; *Adams v. Crittenden*, 106 U. S. 576." See, also, *Grant v. McKee*, 1 Pet. 248; *Stinson v. Dousman*, 20 How. 461; *Gray v. Blanchard*, 97 U. S. 564; *Tintsman v. National Bank*, 100 U. S. 6; *Parker*

sented by the defendant, or if presented sustained by the court?"<sup>1</sup>

§ 19. **The same subject continued.**—When matter set up in a cross-bill is directly responsive to the averments in the bill, and is directly connected with the transactions which are set up in the bill as the gravamen of the plaintiff's case, the amount claimed in the cross-bill may be taken into consideration in determining the jurisdiction on appeal from a decree on the bill.<sup>2</sup> Where a bill was brought to restrain the maintenance of an awning over a part of a street, the matter in dispute was held to be the value of the right to maintain the awning, not the amount of damage done by it to the plaintiff.<sup>3</sup>

*v. Morrill*, 106 U. S. 1; *Russell v. Stansell*, 105 U. S. 808; *Gibson v. Shufeldt*, 122 U. S. 27. And the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendants to the same plaintiff. "The test of jurisdiction is the joint or several character of the liability to the plaintiff." *Walter v. Northeastern R. Co.* (U. S., 1898), 18 S. Ct. Rep. 848. In a foreclosure suit involving more than \$2,000 the circuit court has jurisdiction to determine the priority of all liens upon the premises set up by cross-bill, regardless of the amount claimed. *Courtney v. Ins. Co.*, 4 U. S. App. 140; s. c., 1 C. C. A. 249, holding as a consequence that as the jurisdiction of the circuit court of appeals is not limited to any amount, it may entertain an appeal from a decree on such a cross-bill refusing to recognize a lien for less than \$2,000.

<sup>1</sup>*Schunk v. Moline*, 147 U. S. 500, 505. But no mere pretense as to the amount in dispute will avail to create

jurisdiction. *Bowman v. Chicago &c. R. Co.*, 115 U. S. 611.

<sup>2</sup>*Lovell v. Cragin*, 186 U. S. 180. See, also, *Dushane v. Benedict*, 120 U. S. 680.

<sup>3</sup>*Whitman v. Hubbell*, 80 Fed. Rep. 81. See further, for the matter in dispute in injunction cases, *Symonds v. Greene*, 28 Fed. Rep. 884; *Mississippi &c. R. Co. v. Ward*, 2 Black, 485; *Oleson v. Northern Pac. R. Co.*, 44 Fed. Rep. 1; *Market Co. v. Hoffman*, 101 U. S. 112. On bill for an account, *McCormick v. Gray*, 13 How. 26. Where two or more parties join as complainants, *Rich v. Bray*, 37 Fed. Rep. 278; *Shields v. Thomas*, 17 How. 8; *Massa v. Cutting*, 80 Fed. Rep. 1; *Bruce v. Manchester &c. R. Co.*, 117 U. S. 514; *Johnston v. Straus*, 26 Fed. Rep. 57; *Johnson v. Waters*, 111 U. S. 640; *Miller v. Clark*, 188 U. S. 228; *Davies v. Corbin*, 112 U. S. 86; *Handley v. Stutz*, 187 U. S. 366; *Estes v. Gunter*, 121 U. S. 183; *Brown v. Trousdale*, 188 U. S. 389; *Hill v. Glasgow R. Co.*, 41 Fed. Rep. 610. Miscellaneous. *Murphy v. East Portland*, 42 Fed. Rep. 808; *Moore v. Edgefield*, 82 Fed. Rep. 498; *American Fertilizer*

**§ 20. Original jurisdiction of the United States Supreme Court.**—The constitution of the United States provides that “In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction;”<sup>1</sup> but that “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by the citizens of another State, or by citizens or subjects of any foreign State.”<sup>2</sup> It is provided by act of congress<sup>3</sup> that “The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction.”<sup>4</sup> It is well settled that a State may, in the Supreme Court, litigate a disputed boundary line with an-

Co. v. Board &c., 43 Fed. Rep. 609; Sharon v. Terry, 86 Fed. Rep. 837, 848. In the last case Justice Field said: — “It is well settled that where the controversy is not respecting the amount or value of the matter in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the cause or by affidavit filed in behalf of the parties.” The suit may be maintained although the claim<sup>5</sup> is made up of distinct demands of less value than \$2,000, and although the plaintiff may have acquired such demands by assignment. Bernheim v. Birnbaum, 80 Fed. Rep. 885. On a bill to enjoin the obstruction of a right of way, the value of the property to which the right is appurtenant cannot be considered in determining the amount in dispute. Coleman v. Aldrich (Vt.), 17 Atl. Rep. 848. An allegation by the mortgagee in an action by him to enjoin the construction of a sewer to the injury of the mortgaged property, that such construction will impair the value of his security to an

amount exceeding \$2,000, is sufficient to give jurisdiction to a federal circuit court. Clapp v. City of Spokane, 53 Fed. Rep. 505.

<sup>1</sup> Const., art. III, § 2. Congress cannot constitutionally confer on it any other or further original jurisdiction. Story on the Constitution (4th ed.), § 1708; Wiscart v. Dauchy, 3 Dall. 321; Marbury v. Madison, 1 Cranch, 137, 178.

<sup>2</sup> Eleventh Amendment to the Constitution. Prior to this amendment it had been held that a State was suable in the Supreme Court by a citizen of another State. Chisholm v. Georgia, 2 Dall. 419. This amendment was construed to include suits then pending, which were thereupon dismissed. Hollingsworth v. Virginia, 8 Dall. 378. For the history and reasons of the amendment, see Cohens v. Virginia, 6 Wheat. 406.

<sup>3</sup> U. S. R. S., § 687.

<sup>4</sup> A State cannot maintain a suit in the Supreme Court against one of her own citizens. Pennsylvania v. Quicksilver Company, 10 Wall. 558.



other State;<sup>1</sup> and a controversy between the United States and a State, concerning the boundary between the State and a Territory of the United States, does not fall within the principle of the cases which hold that the courts have no jurisdiction to determine "political questions;"<sup>2</sup> and the procedure in such cases has been referred to in a preceding section.<sup>3</sup> Where the subject-matter of a bill for relief on behalf of a State relates to rights of a political character, the court possesses no jurisdiction.<sup>4</sup> One State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the constitution, by assuming the prosecution of debts owing by the other State to citizens of the former.<sup>5</sup> A State may by original suit in the Supreme Court enjoin citizens of another State from receiving payment from the national government, and to compel the surrender to the plaintiff of government bonds, the property of the plaintiff, which the defendant acquired after maturity with notice of defective title in the seller.<sup>6</sup> Some of the cases illustrating

<sup>1</sup> *Missouri v. Kentucky*, 11 Wall. 895; *Virginia v. West Virginia*, 11 Wall. 89; *Alabama v. Georgia*, 28 How. 505; *Florida v. Georgia*, 17 How. 478; *Missouri v. Iowa*, 10 How. 1; *Missouri v. Iowa*, 7 How. 660; *Rhode Island v. Massachusetts*, 15 Peters, 233; s. c., 4 How. 591; *Rhode Island v. Massachusetts*, 13 Peters, 23; *Massachusetts v. Rhode Island*, 12 Peters, 755; *New Jersey v. New York*, 3 Peters, 461; s. c., 5 Peters, 264; 6 Peters, 623.

<sup>2</sup> *United States v. Texas*, 143 U. S. 631, where it was said that that principle only applies to controversies with independent nations, the determination of which is committed to the executive department of the government. It was also held that the proper mode of proceeding is by bill in equity.

<sup>3</sup> § 9. In *Missouri v. Iowa*, 7 How. 660, 667, the court said:—"Bill and cross-bill is deemed the most appropriate mode of proceeding applicable

to cases like the present, as it always offers an opportunity to the court of making an affirmative decree for the one side or the other, and of establishing by its authority the disputed line, and of having it permanently marked by commissioners of its own appointment, if that be necessary." See, also, *United States v. Texas*, 143 U. S. 621.

<sup>4</sup> *Georgia v. Stanton*, 6 Wall. 50, a bill to enjoin the execution of the "reconstruction acts." See, also, the remarks of Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Peters, 29, 80.

<sup>5</sup> *New Hampshire v. Louisiana*, 108 U. S. 76; *New York v. Louisiana*, 108 U. S. 76, where bonds against the State of Louisiana, held by citizens of the plaintiff States, were assigned to the latter under the provisions of acts which constituted the States mere collecting agents.

<sup>6</sup> *Texas v. White*, 7 Wall. 700. "A State may maintain a bill against



the care taken by the Supreme Court to avoid the exercise of unconstitutional original jurisdiction are cited in the note.<sup>1</sup>

**§ 21. Appellate jurisdiction of the United States Supreme Court.**—The jurisdiction of the Supreme Court to review the decisions of the inferior federal courts is now exclusively provided for by the Evarts Act of March 3, 1891.<sup>2</sup> By that act appeals may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:—"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. From the final sentences and decrees in prize causes. In cases of conviction of a capital or otherwise infamous crime. In any case that involves the construction or application of the constitution of the United States. In any case in which the constitutionality of any law of the United States,<sup>3</sup> or the validity or construction of any

citizens of other States to enforce its title to a railroad." Foster's Federal Practice (2d ed.), p. 29, citing *State of Florida v. Anderson*, 91 U. S. 667.

<sup>1</sup> Where the circuit court ought to have dismissed a suit for want of jurisdiction, and not upon its merits, its decree dismissing it on the merits was reversed, and the case remanded with directions to dismiss the suit for want of jurisdiction. *Blacklock v. Small*, 127 U. S. 97. Defendant took an appeal from a decree adjudging damages against him for infringement of a patent. No *supersedeas* bond having been filed, the plaintiff took out execution, and in aid of it filed a bill against defendant to set aside certain conveyances as fraudulent and void, and obtained a decree in his favor, from which defendant appealed. The decree in the first case (for infringement) was reversed by the Supreme Court, and when the appeal in the second case came on, the defendant, appellant below, set up said reversal and moved that the

decree be reversed and the cause remanded with instructions to dismiss the bill. The Supreme Court, premising that "this court cannot entertain proceedings that require the exercise of original jurisdiction, except in a few cases pointed out in the constitution," remanded the cause to the circuit court "with instructions to allow the appellant to file such supplemental bill as he may be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree," by reason of the reversal of the original decree. *Ballard v. Searls*, 130 U. S. 50.

<sup>2</sup> 26 U. S. St. at L., ch. 517, p. 826 *et seq.* Section 14 of the act (26 U. S. St. at L., p. 829) repeals all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions therefor in sections 5 and 6 of the act. That the entire appellate jurisdiction is comprised within this act, see further, § 23, n. 4, *infra*.

<sup>3</sup> The whole case is subject to review where a constitutional question

treaty made under its authority, is drawn in question. In any case in which the constitution or law of a State is claimed to be in contravention of the constitution of the United States.”<sup>1</sup> In all cases where the judgment or decree of the circuit court of appeals is not final,<sup>2</sup> “there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed \$1,000 besides costs.”<sup>3</sup> But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed.”<sup>4</sup> And in every subject within its *final* jurisdiction<sup>5</sup> “the circuit court of appeals at any time may certify to the Supreme Court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.”<sup>6</sup> Furthermore, “in any such case as is . . . made final in the circuit court of appeals<sup>7</sup> it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”<sup>8</sup> The Supreme Court had jurisdiction to review the final judgment or decree of the Supreme Court of the District of Columbia in any case where the matter in dispute exceeds the sum or value of \$5,000,<sup>9</sup> and “without regard

is in issue. *Horner v. United States*, 143 U. S. 570; *Ekin v. United States*, 142 U. S. 651.

<sup>1</sup> 26 U. S. St. at L., ch. 517, § 5, p. 827.

<sup>2</sup> “In all cases not hereinbefore in this section made final.” 26 U. S. St. at L., ch. 517, § 6, p. 828. For the preceding part referred to, see § 28, *infra*.

<sup>3</sup> See *Northern Pac. R. Co. v. Amato*, 144 U. S. 465.

<sup>4</sup> 26 U. S. St. at L., ch. 517, § 6, p. 828.

<sup>5</sup> For its final jurisdiction, see § 28, *infra*.

<sup>6</sup> 26 U. S. St. at L., ch. 517, § 6, p. 828.

<sup>7</sup> See § 28, *infra*.

<sup>8</sup> 26 U. S. St. at L., ch. 517, § 6, p. 828.

<sup>9</sup> 22 U. S. St. at L., ch. 355, § 1, p. 448, superseded by the act establishing a court of appeals in the District of Columbia, 27 U. S. St. at L., ch. 74, § 8, p. 436. The amount is still \$5,000.

to the sum or value of the matter in dispute, any case in that court wherein is involved the validity of any treaty or statute of, or an authority exercised under, the United States.”<sup>1</sup> Formerly the Supreme Court had jurisdiction to review by writ of error the final judgments in all cases at law tried before a jury, and by appeal all other judgments and all decrees of the Supreme Court of any Territory, where the value of the matter in dispute, exclusive of costs, ascertained by the oath of any party or other competent witness, exceeded \$5,000.<sup>2</sup> Part of this jurisdiction is conferred by the Evarts act upon the circuit courts of appeal.<sup>3</sup> That act also provides for appeals to the Supreme Court from decisions of the United States court in the Indian Territory.<sup>4</sup>

**§ 22. The same subject continued — Review of decisions of State courts.**— “A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution

<sup>1</sup> 23 U. S. St. at L., ch. 855, §§ 1, 2, p. 448. For the judicial construction of this clause and the decisions relating to appeals generally, see Chapter XXVIII, *infra*. In cases where the matter in dispute exceeds \$100, but is less than \$1,000, a writ of error may be allowed by a justice of the Supreme Court if he shall be of opinion, upon petition, etc., presented to him, that the errors involved questions of law of such extensive operation as to render a decision of them by the Supreme Court desirable. U. S. Rev. St., § 706. See *Campbell v. Reed*, 2 Wall. 198; *Wise v. Columbian T. Co.*, 7 Cranch, 276.

<sup>2</sup> U. S. Rev. St., §§ 702, 1909; 23 U. S. St. at L., ch. 855, p. 448.

<sup>3</sup> “The circuit courts of appeal, in cases in which the judgments of the circuit courts of appeal are made final by this act [see § 28, *infra*], shall have the same appellate jurisdiction, by writ of error or appeal, to the courts of Territories, as by this act they may have to review the judgments, orders and decrees of the district court and circuit courts, and for that purpose the several Territories shall, by orders of the circuit court, to be made from time to time, be assigned to particular courts.” 26 U. S. St. at L., ch. 517, § 15, p. 830.

<sup>4</sup> 26 U. S. St. at L., ch. 517, § 18, p. 829.

or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority,—may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case and award execution, or remand the same to the court from which it was so removed. The Supreme Court may re-affirm, reverse, modify or affirm the judgment or decree of such court, and may at their discretion award execution and remand the same to the court from which it was removed by the writ.”<sup>1</sup>

<sup>1</sup> U. S. Rev. St., § 709. This statute is not affected by the Evarts act of March 3, 1891 (26 U. S. St. at L., ch. 517, § 5, p. 827). As to the distinction between the construction of a statute and the “validity” of a statute see *Glenn v. Garth* (U. S., 1893), 13 S. Ct. Rep. 350; *Railroad Co. v. Hopkins*, 180 U. S. 210; *Banking Co. v. Marshall*, 12 How. 165. The Supreme Court will not entertain jurisdiction if the decision was rendered upon grounds independent of any federal question and broad enough in themselves to sustain the judgment. *Hammond v. Johnson*, 142 U. S. 78, 78; *Haley v. Breeze*, 144 U. S. 180; *a. c.*, 12 S. Ct. Rep. 886; *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679; *Beatty v. Benton*, 185 U. S. 244; *Hopkins v. McLure*, 133 U. S. 380; *San Francisco v. Itsell*, 133 U. S. 65; *Hale v. Akers*, 132 U. S. 554; *Marrow v. Brinkley*, 129 U. S. 178. See, also, *Davis v. State*, 139 U. S. 651; *Cook Co. v. Calumet &c. Co.*, 138 U. S. 635; *Johnson v. Risk*, 137 U. S. 300; *Maguire v. Tyler*, 8 Wall. 651. “There may be other questions, but it is the presence of the ‘federal

question,’ and the decision of the State court adverse to the federal right, that confers jurisdiction. The mere *presence* of some one of these questions is not sufficient. It must be *material*; it must appear to have been necessary for the State court to pass upon it in disposing of the suit, and it must have done so.” *Caruthers’s “History of a Law-suit”* (8d ed.), § 6, p. 8. In *Thorington v. City Council* (U. S., 1893), 13 S. Ct. Rep. 895, a decision on a matter of practice under the local procedure was held not to raise a federal question. A certificate of the chief justice of a State court, showing that a right claimed under the federal constitution, laws or authority was denied by the decision of that court, cannot of itself give jurisdiction to the United States Supreme Court on a writ of error (see *Caperton v. Boyer*, 14 Wall. 216), but it may be considered for the purpose of rendering more certain and specific a federal question which was raised on the record in general and indefinite terms. *Roby v. Colehour* (U. S., 1893), 13 S. Ct. Rep. 47. “The bare averment

**§ 23. Jurisdiction of the United States circuit court of appeals.**—For the purpose of relieving the United States Supreme Court of “the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern, and delayed suitors in the administration of justice,”<sup>1</sup> congress passed an act approved March 3, 1891,<sup>2</sup> entitled “An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.” By this act a circuit court of appeals was established in each of the existing circuits with “appellate jurisdiction to review, by appeal or by writ of error, final decisions in the district court, and the existing circuit courts, in all cases other than those provided for in the preceding section of this act,<sup>3</sup> unless otherwise provided by law;<sup>4</sup> and the judgments or decrees of the

of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay.” *New Orleans v. New Orleans Water-works Co.*, 142 U. S. 79, 87, quoted in *Hamblin v. Western Land Co.* (U. S., 1898), 18 S. Ct. Rep. 353, 354. See, also, 1 *Desty's Federal Procedure* (8th ed.), § 228, n.

<sup>1</sup> *In re Woods*, 148 U. S. 202, 205; *Lau Ow Bew v. United States*, 144 U. S. 55.

<sup>2</sup> 26 U. S. Stat. at L., ch. 517, p. 826 *et seq.* It is commonly called the Evarts Act, after the eminent jurist and statesman who had charge of the bill.

<sup>3</sup> The preceding section is as follows:—“Appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:—In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be

certified to the Supreme Court from the court below for decision. From the final sentences and decrees in prize cases. In any case that involves the construction or application of the constitution of the United States. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under it authority, is drawn in question. In any case in which the constitution or law of a State is claimed to be in contravention of the constitution of the United States.” 26 U. S. Stat. at L., ch. 517, § 5, p. 827.

<sup>4</sup> “The appellate jurisdiction not vested in this court [the Supreme Court] was thus vested in the court created by the act, and the entire jurisdiction distributed. *McLish v. Roff*, 141 U. S. 661, 666. The words ‘unless otherwise provided by law’ were manifestly inserted out of abundant caution in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against.

circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy as if it had been brought there for review by writ of error or appeal; and excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”<sup>1</sup>

To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause.” *Lau Ow Bew v. United States*, 144 U. S. 47, 56.

<sup>1</sup> U. S. Stats. at L., ch. 517, § 6. Section 7 of the same act provides for appeals from the district or circuit court to the circuit court of appeals where an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which the circuit court of appeals has jurisdiction of an appeal from a final decree. Section 18 provides for appeals from United States courts in the Indian Territory to the circuit court of appeals, and section 15 for appeals from the Supreme Courts of

Territories. The act took effect immediately, so that appeals might be taken to the circuit court of appeals at once (*Desty's Federal Procedure* (8th ed.), § 167; *In re Claassen*, 140 U. S. 209; *McLish v. Roff*, 141 U. S. 661; *Railroad Co. v. Bennett*, 49 Fed. Rep. 598; s. c., 1 C. C. A. 392; *Baltimore & C. R. Co. v. Andrews*, 50 Fed. Rep. 728; s. c., 1 C. C. A. 686), although such causes involving less than \$5,000 were not previously reviewable in any court. *Northern Pac. R. Co. v. Amato*, 49 Fed. Rep. 881; s. c., 1 U. S. App. 118. “This act provides for the distribution of the entire appellate jurisdiction of our national judicial system between the Supreme Court of the United States and the circuit court of appeals,



§ 24. Suits “arising under the constitution or laws of the United States.” — The United States circuit courts have original cognizance concurrently with the State courts of all suits at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and *arising under the constitution or laws of the United States*, or treaties made under their authority, or in which controversy the United States are plaintiffs or petitioners.<sup>1</sup> “The character of a case is determined by the questions involved.<sup>2</sup> If from the questions it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States . . . ; otherwise not. Such is the effect of the decisions on this subject.”<sup>3</sup> A suit may arise under the constitution or laws of the United States although it may involve questions other than those which depend on the constitution and laws.<sup>4</sup> Where a suit was brought for moneys alleged to be due to the complainant under a contract whereby certain letters patent granted to him were transferred to the defendant, and the validity or construction of the patents was not involved, the suit did not arise under the laws of the United States.<sup>5</sup> A suit merely on

therein established, by designating the classes of cases in respect of which each of those two courts shall, respectively, have final jurisdiction.” *McLish v. Roff*, 141 U. S. 661; *Badaracco v. Cerf*, 58 Fed. Rep. 169. The limitation of the appellate jurisdiction of the Supreme Court to cases involving \$5,000 or over being expressly repealed by section 14 of the act, there is no ground for contending that such limitation applies to the jurisdiction of the circuit court of appeals. *Northern Pac. R. Co. v. Amato*, 49 Fed. Rep. 881; s. c., 1 U. S. App. 113; 1 C. C. A. 468.

<sup>1</sup> 24 U. S. St. at L., ch. 878, p. 552.

<sup>2</sup> *Osborn v. Bank of United States*,

9 Wheat. 737, 824.

<sup>3</sup> Chief Justice Waite in *Starin v.*

New York, 115 U. S. 248, 257, citing *Cohens v. Virginia*, 6 Wheat. 264, 879; *Osborn v. Bank of United States*, 9 Wheat. 737, 824; *Mayor v. Cooper*, 6 Wall. 247, 252; *Gold Washing and Water Co. v. Keyes*, 96 U. S. 199, 201; *Tennessee v. Davis*, 100 U. S. 257, 264; *Railroad Co. v. Mississippi*, 102 U. S. 185, 140; *Ames v. Kansas*, 111 U. S. 449, 462; *Kansas Pac. R. Co. v. Atchison R. Co.*, 112 U. S. 414, 416; *Provident Savings Co. v. Ford*, 114 U. S. 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11.

<sup>4</sup> *Southern Pac. R. Co. v. California*, 118 U. S. 109; *Railroad Co. v. Mississippi*, 102 U. S. 185, 141; *Ames v. Kansas*, 111 U. S. 449.

<sup>5</sup> *Albright v. Teas*, 106 U. S. 618.

In such cases the dispute “arises out



a judgment of a United States court is not within the clause under discussion,<sup>1</sup> but it is otherwise where a suit is brought by or against a corporation chartered by congress, which latter, according to the masterly analysis of Chief Justice Marshall,<sup>2</sup> "is pervaded from its origin to its close by United States laws and United States authority."<sup>3</sup>

of the contract stated in the bill; and there is no act of congress providing for or regulating contracts of this kind." *Wilson v. Sandford*, 10 How. 99; *Hartell v. Tilghman*, 99 U. S. 547; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46. See, also, *Goodyear v. India-Rubber Company*, 4 Blatchf. 63; *Merserole v. Union Paper Collar Co.*, 6 Blatchf. 656; *Blanchard v. Sprague*, 1 Cliff. 288; *Hill v. Whitcomb*, 1 Holmes, 817; *Felix v. Schumweber*, 125 U. S. 54. But it was said in *Continental Stove Service Co. v. Clark*, 100 N. Y. 365, 371, that the State court "may determine what the contract is and in whom the title to the patent is vested, but it has no right to say that a party shall be enjoined from using the patent, or in any way to pass upon any question arising as to its infringement." See, also, on this point, *Hat Sweat Mfg. Co. v. Reinoehl*, 102 N. Y. 167; *St. Paul Plow Works v. Starling*, 127 U. S. 376; *Seibert C. O. Cup Co. v. Manning*, 32 Fed. Rep. 625.

<sup>1</sup> *Provident Savings Society v. Ford*, 114 U. S. 635; *Metcalf v. Wattertown*, 128 U. S. 586, in which it was also said by Justice Harlan:—"Where, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear in that class of cases

that the suit was one of which the circuit court at the time its jurisdiction is invoked could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the State court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind." It was also pointed out that the cases retained where the question was first raised by answer or plea were removed, not original, cases. Where the circuit court has jurisdiction of an original bill by reason of a federal question involved, a supplemental bill is demurrable which presents matters purely local in their nature and of which it has no original jurisdiction. *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 33 Fed. Rep. 689.

<sup>2</sup> In *Osborn v. Bank of United States*, 9 Wheat. 738.

<sup>3</sup> Per Justice Bradley in *Provident Savings Society v. Ford*, 114 U. S. 635, 642; *Pacific Railroad Removal Cases*, 115 U. S. 1. But a Territorial corporation is not a federal corporation. *Adams Express Co. v. Denver &c. R. Co.*, 16 Fed. Rep. 712. National banks

**§ 25. The same subject continued.**— A case does not arise under the laws of the United States simply because the Supreme Court or any other federal court has determined in another suit the principles of law which govern the rights of the parties,<sup>1</sup> nor where the only issues tendered by the bill are issues of fact.<sup>2</sup> But when the acts complained of are done under a law of the United States, or the defense must rest upon such a law, it is a case within the jurisdiction of the circuit court.<sup>3</sup> “The jurisdiction of this court,” said Judge Shiras, “either by original process or by removal, in the class of cases under consideration, depends solely upon the fact that the controversy between the parties requires, for its final determination, the construction of some provision of the constitution, laws or treaties of the United States, and the application thereof to the facts of the particular case, in such sense that the ruling thus made will naturally affect the conclusion reached

are excepted by statute. Act of March 3, 1887, § 4 (24 St. at L. ch. 378). See Act of August 18, 1888 (25 St. at L. 483); *Stephens v. Bernays*, 44 Fed. Rep. 642; *Petri v. Commercial Nat. Bank*, 142 U. S. 644. A claim that a municipal ordinance impairs the obligation of a contract will not sustain the jurisdiction of a federal court unless the ordinance is authorized or supposed to be authorized by a law of the State. *Hamilton Gas Light & Coke Co. v. City of Hamilton* (U. S., 1892), 18 S. Ct. Rep. 90. The same statute (24 U. S. St. at L. ch. 378, p. 552) confers jurisdiction of controversies between citizens of the same State claiming land under grants of different States. See *Colson v. Lewis*, 2 Wheat. 377, 379; *Pawlet v. Clark*, 9 Cranch, 292. In *Holt on Concurrent Jurisdiction*, § 60, the author expresses the opinion that the two thousand dollar limitation does not apply to controversies in which the United States are plaintiffs or petitioners, or to controversies between citizens of the same State claiming lands under grants of differ-

ent States, and that (§ 61) in any event the circuit courts will retain jurisdiction of all suits in equity by the United States in which \$500 is involved, the amount fixed in the Revised Statutes not being deemed to be repealed by the act of 1887. 24 U. S. St. at L. ch. 378, § 4, p. 552, also confers jurisdiction, irrespective of the value of the matter in dispute, of cases commenced by the United States or by direction of any officer thereof against national banks, or cases for winding up the affairs of any such bank.

<sup>1</sup>*Leather M'f'rs Nat. Bank v. Cooper*, 120 U. S. 778; s. c., 7 S. Ct. Rep. 777.

<sup>2</sup>*Holland v. Hyde*, 41 Fed. Rep. 897, a suit to cancel a land patent on the ground of fraud. See, also, *Murray v. Bluebird Min. Co.*, 45 Fed. Rep. 885, 386.

<sup>3</sup>*Sowles v. Witters*, 43 Fed. Rep. 700, a suit against a receiver of a national bank; *Evans v. Dillingham*, 43 Fed. Rep. 177, a suit against a receiver appointed by a federal court. See, also, *Wardens &c. v. Sowles*, 51 Fed. Rep. 609.

upon the controversy between the adversary parties to the litigation. Unless from the record it clearly appears that the federal question must be met and decided before the issue or issues in the particular cause can be finally disposed of, it cannot be said that the matter in dispute arises under the constitution or laws of the United States.”<sup>1</sup>

**§ 26. Equitable jurisdiction of the United States district courts.**—The jurisdiction of the United States district courts embraces suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title or interest, suits against consuls or vice-consuls, all matters and proceedings in bankruptcy,<sup>2</sup> and suits upon any contract expressed or implied with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the plaintiff would be entitled to redress against the United States in a court of law, equity or admiralty, if the United States were suable, except certain war claims.<sup>3</sup>

**§ 27. Conflict between federal and State jurisdictions.**—It has long been a settled rule of law in all cases of conflict of

<sup>1</sup> *Murray v. Bluebird Min. Co.*, 45 Fed. Rep. 885. It was said by Judge Brewer on a removed case that “in questions of doubt as to jurisdiction the federal courts should remand. They should not be covetous, but miserly of jurisdiction.” *Kansas v. Bradley*, 26 Fed. Rep. 289, 292. See, to the same effect, *Fitzgerald v. Missouri Pac. Ry. Co.*, 45 Fed. Rep. 812, 819, 820, where Caldwell, J., also said:—“No federal question can arise on an answer irremediably bad in substance.” Where the highest court of a State has adjudicated a federal question it will be recognized as conclusive by the United States circuit court in a suit between the same parties involving the same sub-

ject-matter. The question is reviewable only by the United States Supreme Court. *Pennsylvania R. Co. v. National Docks & Ry. Co.*, 51 Fed. Rep. 858.

<sup>2</sup> U. S. Rev. St., § 568.

<sup>3</sup> 24 U. S. St. at L. 505. Under U. S. Rev. St., § 716, providing that the Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias* and “all other writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law,” the district courts have power to issue writs of *ne exeat republica*. *Lewis v. Shainwald*, 48 Fed. Rep. 492.

jurisdiction between the federal and State courts that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation and incidentally to take possession or control of the subject-matter of the dispute to the exclusion of all interference from other courts of co-ordinate jurisdiction.<sup>1</sup> "The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take by its officers possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of its officer to get the manual possession of the property. While the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might by a seizure of the property make the first suit wholly unavailing. To avoid such a result the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained."<sup>2</sup>

<sup>1</sup> Blodgett, J., in *Union Trust Co. v. Rockford &c. R. Co.*, 6 Biss. 197, 198, citing *Bell v. Ohio L. & T. Co.*, 1 Biss. 260; *Riggs v. Johnson County*, 6 Wall. 166; *Bell v. New Albany &c. R. Co.*, 2 Biss. 390. It has been held by an almost unbroken current of authorities that "a federal court shall not interfere with the administration of affairs lawfully in the custody and jurisdiction of a State court. *Vice versa*, no State court can interfere with the custody and administration of the *res*, which a federal court has lawfully in custody. . . . If there should be a question arising after the administration on the one hand of the State or federal tribunals through its receiver, not coupled with or growing out of the administration of the law through the respective courts, pertaining to the conduct of its officers, such subsequent question can be considered, but not pending the litigation." Treat, J., in *Levi v. Columbia Life Ins. Co.*, 1 Fed. Rep.

207. This is the rule established in the leading case of *Taylor v. Carryl*, 20 How. 583.

<sup>2</sup> Blodgett, J., in *Union Trust Co. v. Rockford &c. R. Co.*, 6 Biss. 197, 198, quoted in *Owens v. Ohio Cent. R. Co.*, 20 Fed. Rep. 1018. The court whose process is first served obtains jurisdiction of all questions which legitimately flow out of the subject-matter of the case. *Union Mut. Life Ins. Co. v. University of Chicago*, 6 Fed. Rep. 448. Where a State court of competent jurisdiction has possession of the *res*, a United States court will not interfere with the possession on the ground that the court was imposed upon by a conspiracy and the possession of the *res* was obtained by fraud. *Attleborough Nat. Bank v. Northwestern Manuf. Co.*, 28 Fed. Rep. 118. But a strict foreclosure of a contract relating to real estate was held under the circumstances of the case to involve a different controversy from a suit to foreclose liens

§ 28. Jurisdiction as dependent upon citizenship.— The United States circuit court has jurisdiction of “suits in which there is a controversy between citizens of different States, in which the matter in dispute exceeds,” etc.<sup>1</sup> The court is required to arrange the parties on opposite sides of the controversy according to their respective interests and contentions.<sup>2</sup> When so arranged it must appear “that those on one side are

upon a part of the property, and that the institution of the former suit in a State court would not deprive a federal court of jurisdiction of the latter. *Hubbard v. Bellew*, 3 Fed. Rep. 447. And a bill in the federal court was sustained against an executor pending proceedings in a State probate court. *Payne v. Hook*, 7 Wall. 425. But see *Payne v. Hook*, 14 Wall. 252. “It may be considered that the two cases of *Payne v. Hook* decide nothing. They are not in accord with each other, nor with the uniform ruling of the Supreme Court of the United States theretofore.” Treat, J., in *Levi v. Columbia Life Ins. Co.*, 1 Fed. Rep. 207. See, generally, *Hutchinson v. Green*, 6 Fed. Rep. 888; *Heidritter v. Elizabeth Oil-Cloth Company*, 111 U. S. 294; *Peale v. Phipps*, 14 How. 368; *Ball v. Tompkins*, 41 Fed. Rep. 486; *Dwight v. Central Vermont R. Co.*, 9 Fed. Rep. 785; *Webb v. Vermont Central R. Co.*, 9 Fed. Rep. 798; *Liggett v. Glenn*, 51 Fed. Rep. 381, a case which was held to be within the rule stated in *Buck v. Colbath*, 3 Wall. 334, as follows: — “It is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or such possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those

rights require them to take possession of the property or not.”

<sup>1</sup> 24 U. S. Stats. at L. 552, § 378. Apart from jurisdiction over the subject-matter a citizen of a Territory cannot sue a citizen of a State in the federal courts; nor an Indian tribe or nation sue a State or citizens. *Southern Kansas Ry. Co. v. Briscoe*, 144 U. S. 188, 186; *New Orleans v. Winter*, 1 Wheat. 91. Citizens of the District of Columbia are under the same incapacity. *Barney v. Baltimore*, 1 Hughes, 118; *Hepburn v. Ellzey*, 3 Cranch, 445. Nor can aliens sue each other in the United States courts. *Rateau v. Bernard*, 8 Blatchf. 244; *Mossman v. Higginson*, 4 Dall. 12. Nor a State sue its own citizens or citizens of another State on the mere ground of diverse citizenship. *Indiana v. Tolleston Club*, 58 Fed. Rep. 18; *Alabama v. Wolfe*, 18 Fed. Rep. 886. Mere residence is *prima facie* evidence of citizenship, although it may be explained and rebutted by proof that it was for temporary purposes. *Lessee of Butler v. Farnsworth*, 4 Wash. (C. C.) 101. See, also, on this point, *Cooper v. Galbraith*, 3 Wash. (C. C.) 564; *Burnham v. Rangely*, 1 Wood. & M. 7; *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 298; *Reynolds v. Adden*, 136 U. S. 348, 352; *Shelton v. Tiffin*, 6 How. 163, 185; and *Kemna v. Brockhaus*, 5 Fed. Rep. 762, 763, where Dyer, J., discusses the subject at length.

<sup>2</sup> *Mangels v. Donan Brewing Co.*,

all citizens of different States from those on the other,"<sup>1</sup> or the jurisdiction must be denied.<sup>2</sup> But "it has been repeatedly decided that formal parties, or nominal parties, or parties

58 Fed. Rep. 518. "It is not in the discretion of the pleader to arrange parties in the suit so as to confer jurisdiction. They must be arranged according to their interests in the suit, and the court when passing on the question of jurisdiction will do this. . . . All those whose interests are antagonistic to the defendants fall on the side of the complainants." *Bland v. Fleeman*, 29 Fed. Rep. 669, 673. See, also, *Brown v. Murray, Nelson & Co.*, 43 Fed. Rep. 708; *Pacific R. Co. v. Ketchum*, 101 U. S. 289; *Carson v. Hyatt*, 118 U. S. 279; *Anderson v. Bowers*, 40 Fed. Rep. 708; *Barney v. Latham*, 108 U. S. 205; *Harter v. Kernochan*, 108 U. S. 562. In a suit for specific performance of a contract to purchase property, one of the complainant vendors being also one of the vendees, but ready and willing to perform his contract, cannot be considered a defendant for the purpose of destroying the diversity of citizenship. *Perin v. Megibben*, 58 Fed. Rep. 86. See, also, *Harter v. Kernochan*, 108 U. S. 562; *Anderson v. Bowers*, 40 Fed. Rep. 708. If it appears that a party defendant should be a complainant, but that the jurisdiction would then fail for want of the necessary diversity of citizenship, the complainant may be permitted to dismiss his bill as to such party, and the question will then remain whether that party is so indispensable that no decree can be made in his absence. *Claiborne v. Waddell*, 50 Fed. Rep. 368 (citing *Horn v. Lockhart*, 17 Wall. 570), where the court said that if there is great delay in raising such a question of jurisdiction the court will consider it in

passing upon the question. See, further, as to purging by amendment or dismissal, *Conolly v. Taylor*, 2 Pet. 556; *Anderson v. Watt*, 138 U. S. 694; *Beebe v. Louisville & C. R. Co.*, 39 Fed. Rep. 481, 484.

<sup>1</sup> *Removal Cases*, 100 U. S. 457, 468; *Blake v. McKim*, 103 U. S. 336; *Mangels v. Donan Brewing Co.*, 58 Fed. Rep. 518. A joint-stock company organized under the laws of a State, but not incorporated, cannot be a citizen. *Chapman v. Barney*, 129 U. S. 677. Nor can a limited partnership, though empowered by statute to sue in its partnership name. In such cases suit can be maintained only by averring the proper citizenship of the individual members. *Carnegie, Phipps & Co. v. Hulbert*, 58 Fed. Rep. 10.

<sup>2</sup> *Mangels v. Donan Brewing Co.*, 58 Fed. Rep. 518, where a mortgage bondholder sued for a foreclosure on behalf of himself and all the other bondholders, and the latter, though not made parties, intervened by leave of court and prayed for a foreclosure. The controversy consisted of a cluster of questions involving the validity of the mortgage and the right of the bondholders to foreclose, and it having appeared that one of them was a citizen of the same State with some of the defendants the jurisdiction failed. The court distinguished *Stewart v. Dunham*, 115 U. S. 61, by the important consideration that in the case at bar the primary object of the suit was to obtain an adjudication which must necessarily affect directly the interests of the intervenors; whereas in the case referred to, which was a creditor's bill, the action of the court



without interest, united with real parties to the litigation, cannot oust the federal courts of jurisdiction, if the citizenship or character of the real parties be such as to confer it.”<sup>1</sup>

§ 29. The same subject continued.—It is the settled practice in the courts of the United States, if the case can be decided on its merits between those who are regularly before them, although other persons not within their jurisdiction may be collaterally or incidentally concerned who must have been made parties if they had been amenable to its process, that these circumstances shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States; provided the decree may be made without affecting their interests.<sup>2</sup>

upon the petitions of intervening creditors who claimed no liens upon the assets of the defendant was merely incidental and ancillary.

<sup>1</sup> Wood v. Davis, 18 How. 467; Wormley v. Wormley, 8 Wheat. 482; New Chester Water Co. v. Holly Manuf. Co., 58 Fed. Rep. 19; Maryland v. Baldwin, 112 U. S. 490; Sioux City &c. Ry. Co. v. Chicago &c. Ry. Co., 27 Fed. Rep. 770. The jurisdiction of a federal court by reason of diversity of citizenship is not defeated by the mere fact that a transfer of the plaintiff's interest was made in order in part to enable the purchaser to bring suit in a court of the United States, provided the transfer was absolute and the assignor parted with all his interest for a good consideration. Crawford v. Neal, 144 U. S. 585, citing McDonald v. Smalley, 1 Pet. 620; Barney v. Baltimore, 6 Wall. 280; Williams v. Nottawa, 104 U. S. 209; Manufacturing Co. v. Bradley, 105 U. S. 175, 180; De Laveaga v. Williams, 5 Saw. 578. See, also, Cross v. Allen, 141 U. S. 528; s. c., 12 S. Ct. Rep. 67.

<sup>2</sup> Vattier v. Hinde, 7 Pet. (1833), 252; Carneal v. Banks, 10 Wheat. 181; Elmendorf v. Taylor, 1 Wheat. 52; Osborn

v. Bank of United States, 9 Wheat. 789. See, also, Equity Rule 47 and Chapter III, *infra*, on PARTIES. But section 787 of the United States Revised Statutes, authorizing the circuit court to entertain jurisdiction of certain suits properly before it when there are several defendants and one or more of them resides out of the district, etc., does not require the court to entertain jurisdiction of a suit, especially in equity, where non-resident defendants are parties of such importance that complete justice cannot be done between the parties to the suit without their presence, and they have not voluntarily appeared; and a demurrer to a bill for an account against three partners, two of whom were non-residents, who were not served and did not appear, was sustained. Duchesse d'Auxy v. Porter, 41 Fed. Rep. 68. See, also, Cunningham v. Macon &c. R. Co., 109 U. S. 446. The expression in the statute “one or more of the defendants” means one defendant if there is but one, or one or more if there are several. Wheelwright v. St. Louis Canal & T. Co., 50 Fed. Rep. 709. “When one is an indispensable party, inability to make him a party does not



**§ 30. Change of citizenship.**— While it is true that a citizen of the United States can instantly transfer his citizenship from one State to another;<sup>1</sup> and if the new citizenship is really and truly acquired his right to sue is a legitimate, constitutional and legal consequence, not to be impeached by the motive of his removal;<sup>2</sup> yet if the plaintiff has no intention of acquiring a new domicile or settled home, and his sole object in removing is to place himself in a situation to invoke the jurisdiction of the court, it will be of no avail for that purpose.<sup>3</sup>

have the effect to give the court jurisdiction of the action as against the other parties, but prevents it from taking jurisdiction. This is familiar law. And it matters not how this inability arises, whether because the party resides beyond the reach of the process of the court or because through the action of some other tribunal it is impossible to make him a party." *Brewer, J., in Porter v. Sabin*, 86 Fed. Rep. 475. The State is an indispensable party to any suit in equity in which its property is sought to be taken and subjected to the payment of its obligations; and as the State cannot be sued such a suit cannot be sustained. *Christian v. Atlantic & N. C. R. Co.*, 118 U. S. 288. Where in a suit to enforce a vendor's lien the vendee conveys the property *pendente lite* to a citizen of the same State as the complainant, the purchaser is not such an indispensable party as to oust the jurisdiction of the court, especially where he had an opportunity to intervene and protect his rights. *Fisher v. Shropshire* (U. S., 1893), 18 S. Ct. Rep. 201. See, also, *Langdon v. Branch*, 87 Fed. Rep. 449, 464.

<sup>1</sup> *Cooper v. Galbraith*, 8 Wash. C. C. 546, 554.

<sup>2</sup> *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121, 125; *Jones v. League*, 18 How. 76, 81. See, also, *Case v.*

*Clarke*, 5 Mason, 70; *Ennis v. Smith*, 14 How. 400, 423; *Robertson v. Carson*, 19 Wall. 94, 106.

<sup>3</sup> *Morris v. Gilmer*, 129 U. S. 815; *Butler v. Farnsworth*, 4 Wash. C. C. 101, 103. The act of March 3, 1875 (18 U. S. St. at L. 472), provides that "if in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." A motion to dismiss for defect of citizenship should be upon due notice to the parties to be affected by the dismissal. *Morris v. Gilmer*, 129 U. S. 815, 826; *Hartog v. Memory*, 116 U. S. 588. A change of citizenship pending the suit does not defeat the juris-

**§ 31. Citizenship of corporations.**—Where a corporation is created by the laws of a State the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the State which created the corporate body; and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.<sup>1</sup> It follows logically that the members of a corporation created by the laws of a foreign State should for like purposes be conclusively presumed to be citizens or subjects of such foreign State.<sup>2</sup> But a corporation chartered in more than one State may be sued in either.<sup>3</sup>

**§ 32. Citizenship of persons suing in a representative capacity.**—It has been repeatedly held that persons who sue in a representative capacity stand upon their own citizenship, irrespective of the citizenship of the persons whom they represent,—such as executors or administrators,<sup>4</sup> guardians, trustees,<sup>5</sup> receivers,<sup>6</sup> etc. Thus, one appointed administrator

diction. *Ober v. Gallagher*, 98 U. S. 199, 206; *Phelps v. Oaks*, 117 U. S. 236; *Stewart v. Dunham*, 115 U. S. 61, 64. As to what is sufficient evidence of a change, see *McDonald v. Salem C. F. Mills Co.*, 81 Fed. Rep. 577; *Rabaud v. D'Wolf*, 1 Paine, 580; *State Savings Ass'n v. Howard*, 81 Fed. Rep. 488.

<sup>1</sup> Per Chief Justice Taney in *Ohio &c. R. Co. v. Wheeler*, 1 Black, 286. To the same point: *Louisville &c. R. Co. v. Letson*, 2 How. 497; *Marshall v. Baltimore &c. R. Co.*, 16 How. 814; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227; *Insurance Co. v. Ritchie*, 5 Wall. 541; *Paul v. Virginia*, 8 Wall. 168; *Railroad Co. v. Harris*, 12 Wall. 65; *Steamship Co. v. Tugman*, 106 U. S. 118; *Muller v. Dows*, 94 U. S. 446. The rule applies to a municipal corporation. *Cowles v. Mercer County*, 7 Wall. 118.

Upon a minute consideration of the legislation relating to national banks it was held that such a corporation may now sue in the federal courts a citizen of a different State from that in which it is located, by reason alone of diverse citizenship. *Petri v. Commercial Nat. Bank*, 142 U. S. 644.

<sup>2</sup> *Steamship Co. v. Tugman*, 106 U. S. 118.

<sup>3</sup> *Page v. Fall River &c. R. Co.*, 81 Fed. Rep. 257.

<sup>4</sup> *Rice v. Houston*, 18 Wall. 66; *Harper v. Norfolk &c. R. Co.*, 86 Fed. Rep. 102; *Bradford v. Williams*, 8 How. 576; *Coal Co. v. Blatchford*, 11 Wall. 172; *Semmes v. Whitney*, 50 Fed. Rep. 666.

<sup>5</sup> *Shirk v. City of La Fayette*, 59 Fed. Rep. 857; *Dodge v. Tulleys*, 144 U. S. 451; *s. c.*, 12 S. Ct. Rep. 728.

<sup>6</sup> *Davies v. Lathrop*, 12 Fed. Rep. 858.

may become a citizen of another State and after such change sue a citizen of the State where he formerly resided in the federal court.<sup>1</sup> And where a person not a citizen of Indiana was appointed trustee by an Indiana court of property situated in the latter State, he was held competent to maintain in the federal court for Indiana a suit in his trust capacity for damages to the property.<sup>2</sup> A suit to foreclose a trust deed is properly brought in the name of the trustee, and the fact that the beneficiary is a citizen of the same State as the grantor does not defeat the jurisdiction of the federal court if the trustee is a citizen of a different State.<sup>3</sup> But where an infant sues by his guardian,<sup>4</sup> or one who is *non compos mentis* by his next friend,<sup>5</sup> the citizenship of the guardian or lunatic determines the jurisdiction of the court.

§ 33. **Objections for want of diverse citizenship.**—Formerly the objection to the jurisdiction from a denial of the complainant's averment of citizenship could only be raised by a plea in abatement.<sup>6</sup> This rule is modified by the act of March 3, 1875,<sup>7</sup> determining the jurisdiction of the United States circuit court. The statute provides that if in any suit commenced in one of such courts, "it shall appear to the satisfaction of such circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as complainants or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but

<sup>1</sup> *Rice v. Houston*, 18 Wall. 66.

<sup>2</sup> *Shirk v. City of La Fayette*, 52 Fed. Rep. 857.

<sup>3</sup> *Dodge v. Tulley*, 144 U. S. 451.

<sup>4</sup> *Dodd v. Ghiselin*, 27 Fed. Rep. 405; *Woolbridge v. McKenna*, 8 Fed. Rep. 650.

<sup>5</sup> *Wiggins v. Bethune*, 29 Fed. Rep. 51, *Hughes, J.*, dissenting where the next friend is the real plaintiff.

<sup>6</sup> *De Sobry v. Nicholson*, 8 Wall. 420, 423; *Sheppard v. Graves*, 14

*How.* 504, 509; *Wickliffe v. Owings*, 17 *How.* 47; *Bland v. Fleeman*, 29 Fed. Rep. 669. Where a party puts in a plea in abatement to the jurisdiction on the ground of citizenship and the issue is tried and determined upon sufficient pleadings as to form and substance, it is determined for the case and the question cannot again be raised. *Sharon v. Hill*, 26 Fed. Rep. 722.

<sup>7</sup> 18 U. S. St. at L. 472.

shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." In such cases it is undoubtedly the duty of the circuit court, of its own motion, to deny its jurisdiction,<sup>1</sup> and the Supreme Court will, on writ of error or appeal, see that that jurisdiction has in no respect been thus imposed upon.<sup>2</sup>

**§ 34. Ancillary jurisdiction of the federal courts.**—The question as to what facts are necessary to constitute ancillary jurisdiction in the federal courts has been frequently discussed.<sup>3</sup> "From the principles announced in the authorities the ancillary jurisdiction of the court can only be maintained where the parties to a former suit are before the court, or the facts are such as to make the case a continuation of the former suit, or where the court is called upon to enforce or vacate its judgment or decree or set aside its process or to give relief with reference to property in its possession or under its control, or to bring in outside parties having an interest in the litigation, or where the property involved is in the custody of the court or its officers, and the rights of parties thereto cannot be determined in any other court without a conflict of jurisdiction between the courts. The form of the proceeding must in every case be determined by the particular facts alleged in the bill;"<sup>4</sup> and "the question is not whether the proceeding is supplementary and ancillary or is independent and

<sup>1</sup> *Nashua Railroad v. Lowell Railroad*, 136 U. S. 856, 878; *Bland v. Fleeman*, 29 Fed. Rep. 669.

<sup>2</sup> *Nashua Railroad v. Lowell Railroad*, 136 U. S. 856, 878.

<sup>3</sup> *Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 Pet. 164; *Freeman v. Howe*, 24 How. 450; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 638; *Railroad Co. v. Chamberlain*, 6 Wall. 748; *Thompson v. McReynolds*, 29 Fed. Rep. 657; *Jones v. Andrews*, 10 Wall. 827; *Rosenbaum v. Council Bluffs Ins. Co.* 87 Fed. Rep. 724; *Christmas v. Russell*, 14 Wall. 81; *Barrow v. Hunton*, 99 U. S. 82; *Krippendorf v. Hyde*, 110 U. S. 284;

s. c., 4 S. Ct. Rep. 588; *O'Brien County v. Brown*, 1 Dill. 588; *Dunlap v. Stetson*, 4 Mason, 860; *Conwell v. Valley Canal Co.*, 4 Biss. 200; *Barth v. Makeever*, 4 Biss. 212; *Johnson v. Christian*, 125 U. S. 642; *Osborn v. Railroad Co.*, 2 Flap. 506; *Bowen v. Christian*, 16 Fed. Rep. 780; *Wagon Co. v. Snavely*, 84 Fed. Rep. 828; *Yeatman v. Bradford*, 44 Fed. Rep. 586; *Logan v. Patrick*, 5 Cranch, 288. A suit in order to be ancillary to another must be brought in the same court. *Winter v. Swinburne*, 8 Fed. Rep. 49.

<sup>4</sup> Per Hawley, J., in *Ralston v. Sharon*, 51 Fed. Rep. 702, 710.

original in the sense of the rules of equity pleading, but whether it is supplementary and ancillary, or is to be considered entirely new and original in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the State. No one would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law."<sup>1</sup> A federal court, having jurisdiction and possession, through its receiver, of all the property of a railroad company, thereby acquires jurisdiction

<sup>1</sup>Per Justice Miller in *Minnesota Co. v. St. Paul Co.*, 2 Wall. 638. In *Conwell v. Valley Canal Co.*, 4 Biss. 200, the court said that with reference to third parties the ancillary jurisdiction may be maintained "in a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation either as to the original judgment or any property in the custody of the court or any abuse or misapplication of its process; and if no State court has power to guard and determine those rights and interests without a conflict of authority with the national court, the latter court will from the necessity of the case and to prevent a failure of justice give such third persons a hearing, irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment and as to correct any abuse or misapplication of its process

and no further." In most of the cases cited in the first note to this section, judgments or suits at law were assailed by proceedings on the equity side of the court. In *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 521, the court entertained ancillary proceedings to impeach and set aside its own decree (see, also, *Foster v. Mansfield & Co. R. Co.*, 86 Fed. Rep. 627), and in *McBee v. Marietta & Co. Ry. Co.*, 48 Fed. Rep. 248, 247, to prevent the rendition of a wrongful decree. The statute which forbids a United States court to grant an injunction to stay proceedings in a State court does not prevent it from enjoining a suit on a replevin bond on a judgment obtained in a State court after the replevin suit had been removed to the federal courts. The bill for injunction is merely ancillary to the replevin case of which the State court had ceased to have jurisdiction. *Kern v. Huidekoper*, 108 U. S. 494.

of a subsequent suit to foreclose a mortgage on the same property, irrespective of the citizenship of the parties thereto.<sup>1</sup>

**§ 35. The same subject continued—Supplemental and cross-bills.**—“A cross-bill will be sustained in the federal court where a defendant is compelled to avail himself of that mode of defense in order to protect himself from an injustice resulting to him from the position in which the cause stands, although the parties plaintiff and defendant, or some of them, are citizens of the same State, provided the defendants in such bill are already before the court, and are, as parties to the original bill, subject to its jurisdiction.”<sup>2</sup> But there is no jurisdiction of a cross-bill filed by a defendant against a co-defendant where both are citizens of the same State.<sup>3</sup> An intervenor in a foreclosure suit may file a cross-bill although by reason of citizenship he could not have prosecuted the original suit.<sup>4</sup> So a supplemental bill may be maintained without regard to the citizenship of the parties;<sup>5</sup> or a bill of revivor by the representative of a deceased party, irrespective of the citizenship of such representative.<sup>6</sup>

**§ 36. Jurisdiction by residence.**—By the judiciary act of 1887 the jurisdiction of the United States circuit court is limited in respect of the residence of the parties as follows:—“But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is be-

<sup>1</sup>Carey v. Houston &c. Ry. Co., 52 Fed. Rep. 671.

<sup>2</sup>Schenck v. Peay, 1 Woolw. 175, quoted in Jesup v. Ill. Cent. R. Co., 48 Fed. Rep. 488, 496; First Nat. Bank v. Salem Capital F. M. Co., 81 Fed. Rep. 580; Morgan's La. &c. S. S. Co. v. Texas Cent. R. Co., 137 U. S. 171; Cross v. De Valle, 1 Wall. 5.

<sup>3</sup>Vannerson v. Leverett, 81 Fed. Rep. 876.

<sup>4</sup>Osborne & Co. v. Barge, 80 Fed.

Rep. 805. See, also, Henderson v. Goode, 49 Fed. Rep. 887. But if the court determines that it has no jurisdiction of the original bill on account of the citizenship of the parties, it is no objection to a decree of dismissal that an intervenor in the case has a standing in court. Norton v. European &c. Ry. Co., 82 Fed. Rep. 865.

<sup>5</sup>Miller v. Rogers, 29 Fed. Rep. 401.

<sup>6</sup>Hone v. Dillon, 29 Fed. Rep. 465.



tween citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”<sup>1</sup> It was at first held by the circuit court that the initial clause of the section quoted was the one which prescribed the jurisdiction of the court, and that the second, being prohibitory in form, did not enlarge it; and consequently that a defendant could not be sued in any other district than that of his residence.<sup>2</sup> But in the following year this decision was overruled by one of the judges who concurred in it. “The plain meaning of the clause,” said Justice Field, “so far as it relates to the district in which a civil suit in a circuit or district court may be originally brought, is this:—that such suit, where the jurisdiction is founded upon any of the causes mentioned in the section, except the citizenship of the parties in different States, must be brought in the district of which the defendant is an inhabitant; but where such jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or defendant resides. . . . The concluding lines are to be read as a proviso to the general provision that no civil suit shall be brought except in the district whereof the defendant is an inhabitant.”<sup>3</sup> The same conclusion was reached and announced by many of the circuit courts and finally by the United States Supreme Court.<sup>4</sup> But two or more plaintiffs cannot unite in one suit in a State of which either of them is a citizen.<sup>5</sup> No State statute relating

<sup>1</sup> Act of March 3, 1887, § 1 (24 U. S. St. at L. 552); as amended, 25 U. S. St. at L. 484.

<sup>2</sup> *County of Yuba v. Pioneer Gold Min. Co.* (1887), 82 Fed. Rep. 188, per Sawyer, J.; Field, Justice, and Sabin, JJ., concurring.

<sup>3</sup> *Wilson v. Western Union Tel. Co.* (1888), 84 Fed. Rep. 561, 564.

<sup>4</sup> *McCormick v. Walthers*, 184 U. S. 41; *Fales v. Chicago & Ry. Co.*, 82 Fed. Rep. 673; *St. Louis & R. Co. v. Terre Haute & R. Co.*, 38 Fed. Rep. 385; *Loomis v. New York & Gas Co.*, 88 Fed. Rep. 353; *Gavin v. Vance*, 83 Fed. Rep. 84; *Swayne v.*

*Boylston Ins. Co.*, 85 Fed. Rep. 1; *Pitkin Min. Co. v. Markell*, 88 Fed. Rep. 386; *Western Union Tel. Co. v. Brown*, 82 Fed. Rep. 387.

<sup>5</sup> *Smith v. Lyon*, 138 U. S. 315. Under the act of March 3, 1875 (18 U. S. St. at L., p. 470, ch. 137), which is expressly left in force by the amendatory act of August 13, 1888 (25 U. S. St. at L., p. 483, ch. 866), and which provides that “when in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon . . . real or personal property within the district where such suit is brought,



to the venue of causes can restrict the plaintiff's choice as to the district in which he will sue.<sup>1</sup> Where the citizenship is diverse and the plaintiff is a resident of the district, it is not necessary that he should also reside in the particular division of the district in which the suit is brought.<sup>2</sup>

**§ 37. Residence of corporations.**—The act of March 3, 1887, as corrected by the act of August 13, 1888,<sup>3</sup> provides that “where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant.” It was formerly a question upon which there existed much diversity of opinion in the circuit courts whether a corporation incorporated in one State of the Union, and having a usual place of business in another State in which it had not been incorporated, could be sued in a circuit court of the United States held in the latter State, by a citizen of a different State.<sup>4</sup> But the matter was finally and directly ad-

one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, . . . it shall be lawful for the court to make an order directing such absent defendant or defendants to appear,” etc., the circuit court has jurisdiction of a suit by a resident of another district to foreclose a mortgage on land situated within the district, though some of the defendants are and others are not residents of the district in which the suit is brought. *Ames v. Holderbaum*, 42 Fed. Rep. 841. For a further construction of the act see § 29, n., *supra*.

<sup>1</sup> *East Tennessee &c. R. Co. v. Atlanta &c. R. Co.*, 49 Fed. Rep. 608.

<sup>2</sup> *Merchants' Nat. Bank v. Chattanooga Construction Co.*, 58 Fed. Rep. 314. U. S. Rev. St., § 657, provides that “the original jurisdiction of the circuit court for the southern district of New York shall not be construed to extend to any cause of action arising within the western district of said State.” Causes of ac-

tion arising out of the State are not affected. *Wheeler v. McCormick*, 8 Blatchf. 268. See, also, *Black v. Thorne*, 10 Blatchf. 66.

<sup>3</sup> 24 U. S. Stats. at L., p. 552, § 1; amended 25 U. S. Stats. at L., p. 484, ch. 866.

<sup>4</sup> That the court had jurisdiction was affirmed in *Overman Wheel Co. v. Pope Manuf. Co.*, 46 Fed. Rep. 577; *Milner v. Eastern Oregon Gold Min. Co.*, 45 Fed. Rep. 845; *Hirschl v. J. Kare Threshing Machine Co.*, 42 Fed. Rep. 808; *Consolidated Store-service Co. v. Lamson Consolidated Store-service Co.*, 41 Fed. Rep. 838; *Scott v. Texas Land & Cattle Co.*, 41 Fed. Rep. 225; *Riddle Co. v. New York &c. R. Co.*, 39 Fed. Rep. 290; *Zambrino v. Galveston &c. Ry. Co.*, 38 Fed. Rep. 449. *Contra*, *National Typographic Co. v. New York Typographic Co.*, 44 Fed. Rep. 711; *Amsden v. Norwich Union Fire Ins. Co.*, 44 Fed. Rep. 515; *Myers v. Murray*, 43 Fed. Rep. 695; *Henning v. Western Union Tel. Co.*, 43 Fed. Rep. 97; *Purcell v.*

judicated in 1892 by the Supreme Court of the United States. Mr. Justice Gray, after referring to the judiciary act of 1789, and discussing the subsequent acts of congress relating to the jurisdiction of the federal courts, and quoting from numerous opinions of the Supreme Court, concludes as follows: — “In a case between natural persons, as has been seen, this clause does not allow the suit to be brought in a State of which neither is a citizen. If congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser and broader construction as to artificial persons who were not contemplated than as to natural persons who were. If, as it is more reasonable to suppose, congress did have corporations in mind, it must be presumed also to have had in mind the law so long and uniformly declared by this court, that within the meaning of the previous acts of congress giving jurisdiction of suits between citizens of different States, a corporation could not be considered a citizen or a resident of a State in which it had not been incorporated. . . . This case does not present the question what may be the rule in suits against an alien or a foreign corporation, which may be governed by different considerations. . . . All that is now decided is that under the existing act of congress a corporation incorporated in one State only cannot be compelled to answer, in a circuit court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State.”<sup>2</sup>

British Land & Mortgage Co., 42 Fed. Rep. 465; Bensinger &c. Register Co. v. National Cash Register Co., 42 Fed. Rep. 81; Hohorst v. Hamburg-American Packet Co., 88 Fed. Rep. 273; Fille v. Delaware &c. R. Co., 87 Fed. Rep. 65; Denton v. International Co., 86 Fed. Rep. 1. See, also, Fales v. Chicago &c. Ry. Co., 82 Fed. Rep. 673; County of Yuba v. Pioneer Gold Min. Co., 82 Fed. Rep. 188; Loomis v. New York &c. Coal Co., 88 Fed. Rep. 858; Preston v. Fire Extinguisher Manuf. Co., 86 Fed. Rep. 721, 722.

<sup>1</sup> In *Shaw v. Mining Co.*, 145 U. S. 444; s. c. (*sub nom. Ex parte Shaw*), 12 S. Ct. Rep. 935.

<sup>2</sup> *Shaw v. Mining Co.*, 145 U. S. 444; s. c., 12 S. Ct. Rep. 935, followed in *Southern Pac. R. Co. v. Denton* (U. S.), 18 S. Ct. Rep. 44. It makes no difference that the corporation was organized for the purpose of doing business in the State where it is sued, and that such purpose was expressed in its articles of incorporation. *St. Louis R. Co. v. Pacific Ry. Co.*, 52 Fed. Rep. 770, holding, also, that consent cannot confer ju-

§ 38. **The same subject continued — Waiver of objections.**— The objection that the defendant was not sued in the proper district is waived if not pleaded, provided the court has the requisite jurisdiction in other respects.<sup>1</sup> But “to make the rule applicable that the right to be sued in a particular district is a mere privilege which may be waived by plea to the merits, the parties and subject of controversy must be within the general jurisdiction of the court as defined by the statute. To apply that rule to a case not within such general jurisdiction would be to affirm that consent can give jurisdiction, which manifestly cannot be done.”<sup>2</sup>

§ 39. **Suits by assignees.**— The statute provides that no circuit or district court shall “have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.”<sup>3</sup> “The contents of a chose in action are rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit

jurisdiction in such a case; as to which point see, also, *Indiana v. Tolleston Club*, 58 Fed. Rep. 18. In *Southern Pac. R. Co. v. Denton*, *supra*, it was held that a State statute was invalid which provided that a permit to a foreign corporation to do business therein shall be void if the corporation shall remove any case from a State to a federal court on the ground of non-residence or local prejudice, and the filing of a request for a permit with such a condition annexed did not change the residence of the corporation.

<sup>1</sup>*Vermont Farm Machine Co. v. Gibson*, 50 Fed. Rep. 423, citing *Ex parte Schollenberger*, 96 U. S. 369. See, also, *McBride v. Grand de*

*Tour Plow Co.*, 40 Fed. Rep. 162, where a corporation was concluded by appearing, filing an answer and taking testimony; *Shields v. Thomas*, 18 How. 253; *Consolidated Store-service Co. v. Lamson Consolidated Store-service Co.*, 41 Fed. Rep. 838; *Jewett v. Bradford Sav. Bank & Trust Co.*, 45 Fed. Rep. 801; *St. Louis &c. Ry. Co. v. McBride*, 141 U. S. 127, 132; *Butterworth v. Hill*, 114 U. S. 128, 132; *Sayles v. Northwestern Ins. Co.*, 2 Curt. 212; *Provident Savings &c. Society v. Ford*, 114 U. S. 635, 639.

<sup>2</sup>*St. Louis R. Co. v. Pacific Ry. Co.*, 52 Fed. Rep. 770.

<sup>3</sup>Act of March 3, 1887, § 1 (24 U. S. St. at L. 552).

to recover such contents.”<sup>1</sup> Thus a suit for the specific performance of a contract is within the meaning of the act.<sup>2</sup> And an action upon a contract of insurance and for reformation of the policy, if necessary, is an action to recover the contents of a chose in action.<sup>3</sup> But a proceeding in equity to compel the transfer upon the books of a corporation of corporate stock which the complainant had purchased from a third person is not a suit of which jurisdiction is excluded by the act.<sup>4</sup> Nor does the act apply to cases brought originally in State courts and removed thence to a federal court.<sup>5</sup>

<sup>1</sup> *Corbin v. County of Black Hawk*, 105 U. S. 659, 665.

<sup>2</sup> *Shoecraft v. Bloxham*, 124 U. S. 780; *Corbin v. County of Black Hawk*, 105 U. S. 659, 665.

<sup>3</sup> *Laird v. Indemnity & Co. Ins. Co.*, 44 Fed. Rep. 712.

<sup>4</sup> “The jurisdiction kept away from these courts appears to be that of en-

forcing choses in action in favor of assignees to recover what they will bring. . . . The contents of the stock are not here sought to be recovered.” *Jewett v. Bradford Savings Bank*, 45 Fed. Rep. 801, 802.

<sup>5</sup> *Rosenbaum v. Council Bluffs Ins. Co.*, 87 Fed. Rep. 724.

## CHAPTER III.

### PARTIES.

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| <p>§ 40. Persons capable of suing in equity.</p> <p>41. Suits by aliens.</p> <p>42. Suits against an alien enemy.</p> <p>43. Suits against a sovereign.</p> <p>44. Suits on behalf of infants.</p> <p>45. The same subject continued — Functions of the next friend.</p> <p>46. Infant's rights upon attaining majority.</p> <p>47. Suits against infants.</p> <p>48. The same subject continued — Guardian <i>ad litem</i>.</p> <p>49. Suits on behalf of idiots, lunatics and persons of weak mind.</p> <p>50. Suits against idiots, lunatics and persons of weak mind.</p> <p>51. Husband and wife as parties.</p> <p>52. The same subject continued.</p> <p>53. Suits by and against executors and administrators.</p> <p>54. General rule on the subject of parties.</p> <p>55. Summary statement of the rule in the federal courts.</p> <p>56. Formal parties and parties without interest.</p> <p>57. Interested but not indispensable parties.</p> <p>58. Omission of parties not within the jurisdiction.</p> <p>59. Necessary parties illustrated.</p> <p>60. Improper parties illustrated.</p> | <p>§ 61. Joinder of officers of corporations as defendants.</p> <p>62. When personal representatives may be omitted.</p> <p>63. Suits on behalf of numerous parties.</p> <p>64. The same subject continued.</p> <p>65. Suits by members of voluntary associations.</p> <p>66. Effect of the decree on absent parties.</p> <p>67. Joinder of complainants in cases of fraud.</p> <p>68. The same subject continued.</p> <p>69. Suits affecting rights of residuary legatees.</p> <p>70. Parties in cases of trusts.</p> <p>71. Parties to bills for specific performance.</p> <p>72. Suits to set aside fraudulent conveyances.</p> <p>73. Parties in bills for foreclosure.</p> <p>74. The same subject continued — Parties defendant.</p> <p>75. The same subject continued — Adverse claimants.</p> <p>76. Complainants in bills to redeem.</p> <p>77. Defendants in bills to redeem.</p> <p>78. Objection for want of necessary parties.</p> <p>79. Objection for misjoinder of complainants.</p> <p>80. Objection for misjoinder of defendants.</p> |
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§ 40. Persons capable of suing in equity.—The general rule that all persons, of whatever rank or condition, and whether they have a natural or only political character, are capable of instituting suits in equity, is subject to very few

exceptions, and extends from the highest person in the State to the most distressed pauper.<sup>1</sup> The disabilities by which a person may be prevented from suing are of two kinds: first, such as are absolute, and during the time they last effectually deprive the party of the right to assert his claim; and second, such as are qualified, and merely deprive him of the power of suing without the assistance of some other party to maintain the suit on his behalf. The absolute incapacities in England are alienage, attainder, outlawry and excommunication.<sup>2</sup> In America the two latter are either entirely unknown or of very limited local existence.<sup>3</sup> Partial incapacity to sue exists in the case of infants, married women, idiots and lunatics, and other persons who are incapable or are by law specially disabled to sue in their own names; such as, for example, in some of the States, common drunkards who are under guardianship.<sup>4</sup>

§ 41. Suits by aliens.—The right of prosecuting suits by citizens of one friendly power in the courts of another is a well-established rule of international comity.<sup>5</sup> A citizen of a country at war with the United States and residing in that country cannot sue in the courts of the United States.<sup>6</sup> But

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 5.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 45; Story's Equity Pleading (10th ed.), § 51.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 51. In *In re Metcalfe*, 2 De G., J. & S. 122, Lord Justice Knight-Bruce characterized the argument that a professed nun was civilly dead as "mere nonsense." In *Evans v. Cassidy*, 11 Irish Eq. 248, also, the contention was declared to be without foundation.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 56.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 51; *Mitchell v. Smith*, 1 Paige, 287; *Bishop v. Jones*, 28 Tex. 294, 315. The rule includes foreign sovereigns and corporations. Story's Equity Pleading (10th ed.), § 55. As to sovereigns see *Hullet v. King of Spain*, 2 Bligh

(N. S.), 60; *King of Spain v. Machado*, 4 Russ. 225; *King of Spain v. Mendizabel*, 5 Sim. 596. They may sue in the federal courts (*King of Spain v. Oliver*, 1 Pet. C. C. 276; *The Sapphire*, 11 Wall. 164), or in the State courts. *Republic of Mexico v. Arrangois*, 11 How. Pr. 1; *King of Prussia v. Kuepper*, 22 Mo. 550, in which case (A. D. 1856) the introductory part of the declaration was as follows: "The plaintiff states that he is absolute monarch of the kingdom of Prussia, and as king thereof is the sole government of that country; that he is unrestrained by any constitution or law, and that his will, expressed in due form, is the only law of that country, and is the only legal power there known to exist as law."

<sup>6</sup> *Bell v. Chapman*, 10 Johns. 191,

the incapacity does not extend to such aliens who were residing in the United States when war was declared and are suffered to remain,<sup>1</sup> or who came here to reside during the war by a presumed permission.<sup>2</sup> Where the complainant becomes an alien enemy after the suit is brought, the effect is not to dismiss the bill, but to stay the proceedings until the termination of the war.<sup>3</sup>

§ 42. Suits against an alien enemy.— No reason or policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and it is therefore the rule that while an alien enemy may not sue, he may be sued.<sup>4</sup> “The existence of war does, indeed, close the courts of each belligerent to the citizens of the other, but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other whenever the latter can be reached by process.”<sup>5</sup> The liability to be sued carries with it the right to use all the means and appliances of defense.<sup>6</sup> Where a party voluntarily

holding that the defense may be pleaded in abatement or in bar; *Wilcox v. Henry*, 1 Dall. 69; *Mumford v. Mumford*, 1 Gall. 866; *Kershaw v. Kelsey*, 100 Mass. 561, 568; 1 *Daniell's Ch. Pr.* (5th ed.) 50. The cause of action is only suspended by the war and the remedy revives on the return of peace. *Bell v. Chapman*, *supra*; *Wilcox v. Henry*, *supra*.

<sup>1</sup> *Clarke v. Morey*, 10 Johns. 69.

<sup>2</sup> *Clarke v. Morey*, 10 Johns. 69; *Bishop v. Jones*, 28 Tex. 294, 317.

<sup>3</sup> *Bishop v. Jones*, 28 Tex. 294; *Levine v. Taylor*, 12 Mass. 8; *Hutchinson v. Brock*, 11 Mass. 119; *Elgle v. Lowell*, 1 Woolw. 102; *Story's Equity Pleading* (10th ed.), § 54; *Ex parte Boussmaker*, 18 Vea. 71; *Faulkland v. Stanion*, 12 Mod. 400. *Contra*, *Howes v. Chester*, 88 Ga. 89. The Massachusetts cases above cited maintain that some process has to be sued out and served on the defendant by way of renewing the action at the termination of hostilities. The proper

plea of alien enemy, since suit begun, is a plea of *puis darrein continuance* to the disability of the plaintiff. *Howes v. Chester*, *supra*. The plea is sufficiently answered by a treaty of peace made after the plea was filed. *Johnson v. Harrison*, 6 Litt. 226.

<sup>4</sup> *Bacon's Abr.*, tit. Alien, D.; *Rodgers v. Dibrell*, 6 Lea (Tenn.), 69; *McVeigh v. United States*, 11 Wall. 259; *Masterson v. Howard*, 18 Wall. 99; *Crucher v. Hind*, 4 Bush, 868; *Degiverville v. De Jarnette*, 13 Law Reg. 818; *Dorsey v. Thompson*, 87 Ind. 25; *Dorsey v. Kyle*, 80 Md. 512, where it was held that there was no such thing as a plea by the defendant of his own alien enmity to the government in whose courts he is sued. See, also, *Herbert v. Rowles*, 80 Md. 271.

<sup>5</sup> Justice Field in *Masterson v. Howard*, 18 Wall. 99, 105.

<sup>6</sup> *McVeigh v. United States*, 11 Wall. 259, holding that the alien de-



leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted.<sup>1</sup> In such a case notice by publication is as effectual against him, when duly authorized and regularly given, as it is against any non-resident.<sup>2</sup> But on proceedings by constructive service no personal judgment can be rendered against the defendant.<sup>3</sup>

**§ 43. Suits against a sovereign.**—A sovereign is exempt from the jurisdiction of the courts of another country and cannot be sued therein even though he resides in that country, nor does he by appearing in a suit against him waive his right to demur for want of jurisdiction.<sup>4</sup>

defendant may sue out a writ of error. *Seymour v. Bailey*, 66 Ill. 288. In *Bacon's Abridgment*, title Alien, D., it is said:—"For as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery."

<sup>1</sup> *Ludlow v. Ramsey*, 11 Wall. 581, distinguishing *Dean v. Nelson*, 10 Wall. 158.

<sup>2</sup> *Dorsey v. Thompson*, 87 Md. 25; *Ludlow v. Ramsey*, 11 Wall. 581; *Seymour v. Bailey*, 66 Ill. 288. *Cf.* *Walker v. Day*, 8 Baxt. (Tenn.) 77.

<sup>3</sup> *Sheldon v. Preston*, 11 Bush (Ky.), 191.

<sup>4</sup> *Duke of Brunswick v. King of Hanover*, 6 Beav. 1, where the question was thoroughly discussed. The Master of the Rolls said:—"There have been cases in which this court being called upon to distribute a fund in which some foreign sovereign or State may have had an interest, it has been thought expedient and proper in order to a due distribution of the fund to make such sovereign or State a party. The effect has

been to make the suit perfect as to parties, but as to the sovereign or State made a defendant in cases of that kind, the effect has not been to compel or to attempt to compel such sovereign or State to come in and submit to judgment in the ordinary course, but to give the sovereign an opportunity to come in to claim his right or establish his interest in the subject-matter of the suit. Coming in to make his claim he would by doing so submit himself to the jurisdiction of the court in that matter; refusing to come in he might perhaps be precluded from establishing any claim to the same interest in another form. So, where a defendant in this country is called upon to account for some matter in respect of which he has acted as agent for a foreign sovereign, the suit will not be perfect as to parties unless the foreign sovereign were formally a defendant, and by making him a party an opportunity is afforded him of defending himself instead of leaving the defense to his agent, and he may come in if he pleases; in such a

§ 44. Suits on behalf of infants.— While an infant is incapable of maintaining a suit or other legal proceeding in his own name for the protection of his rights, he is nevertheless entitled to the benefit of every remedy recognized by our system of jurisprudence and to which an adult of full capacity may resort, the only difference being that an infant must proceed in the name of an adult as his next friend or *prochein ami*, while an adult may proceed in his own name. Any person of full age and sound mind may institute a suit on behalf of an infant<sup>1</sup> without any previous authority from the infant<sup>2</sup>

case if he refuses to come in he may perhaps be held bound by the decision against his agent. There may be other cases in which sovereign princes for the sake of having a claim or right determined may have been afforded an opportunity of appearing and may have voluntarily appeared as defendants before the tribunals of this country, but save in the case of a cross-bill or bill of discovery in aid of a defense and in the case of a sovereign prince voluntarily coming in to make or resist a claim, it does not appear how he can be effectually cited or what control the court can have over him or his rights; and no case has been produced in which it has been determined that a foreign sovereign, not himself a plaintiff or claimant, and insisting upon his right to be exempt from the jurisdiction of the ordinary courts, has been held bound to submit to it." See, also, *Vavasseur v. Krupp*, L. R. 9 Ch. D. 351; *Twycross v. Dreyfus*, L. R. 5 Ch. D. 605; *Smith v. Weguelin*, L. R. 8 Eq. 198. In *The Charkieh*, L. R. 4 Ad. & Ec. 59, a distinction is suggested where a foreign sovereign assumes the character of a trader.

<sup>1</sup> Macpherson on the Law of Infants, 864; *Starten v. Bartholomew*, 6 Beav. 148, 144; *Chambers on the Property of Infants*, 757. And where the letter of the statute required the

next friend to file a bill for costs, it was held not to be a condition of the right to bring suit, but that the bond might be ordered before final judgment. *Kingsbury v. Buckner*, 134 U. S. 650, 679. In many States the guardian sues, describing himself as such, but he is charged with all the duties and liabilities that would attach to him under the description of next friend. *Gibson's Suits in Chancery*, § 145; *Simpson v. Alexander*, 6 Cold. 680. Where a petition averred it was brought on behalf of an infant (and others), "by her father and natural guardian," and both the infant and father signed the petition, the latter being a petitioner himself and not signing as guardian, a decree in the cause was held to be binding upon the infant. *Clark v. Platt*, 30 Conn. 282.

<sup>2</sup> *Morgan v. Thorne*, 7 M. & W. 400, 408; 1 *Daniell's Ch. Pr.* (5th ed.) 68, n. A bill may be filed on behalf of an infant *en ventre sa mère*. *Lutterel's Case*, cited *Prec. Ch.* 50; *Wallis v. Hodson*, 2 Atk. 117. And an infant attains his majority on the first moment of the day preceding his twenty-first birthday. 1 *Daniell's Ch. Pr.* (5th ed.) 67; *Hamlin v. Stephenson*, 4 Dana, 597; *State v. Clark*, 8 Harring. 557; *Herbert v. Tarball*, 1 Sid. 142; & c., *Raym.* 84.

or from the court.<sup>1</sup> But the court, on suggestion of its being improperly instituted, will refer it to a master to inquire into the circumstances and report whether the suit is for the benefit of the infant.<sup>2</sup> The nearest relative of the infant is usually preferred for his next friend. The father being the natural guardian of his infant child has a vested right, as it has been called, to act as his next friend in a litigation involving the child's rights, if the father's interests are not hostile and he has been guilty of no default or misconduct. This right is regarded as so superior by the English courts that it has been declared that the father has a right, even where another person has instituted a suit in behalf of his infant child and prosecuted it to a decree, to have such other person displaced after decree pronounced and himself substituted as next friend.<sup>3</sup>

§ 45. The same subject continued — Functions of the next friend.— The relation of a next friend to the action and his powers and duties are simple and well defined. He is no party to the suit in the technical sense of the term, although he is responsible for costs, and there is no jurisdiction

<sup>1</sup> *Klaus v. State*, 54 Miss. 644; *Bethea v. Call*, 8 Ala. 449; *Isaacs v. Boyd*, 5 Porter (Ala.), 888; *Jackson v. Blanchard*, 3 Conn. 579; *Story's Equity Pleading* (10th ed.), § 60, note a. The eighty-seventh equity rule of the United States Supreme Court provides that "all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons."

<sup>2</sup> *Garr v. Drake* (1817), 2 Johns. Ch. 542. The bill may be dismissed without a reference. *Sale v. Sale*, 1 Beav. 586. And it is not proper to order a reference at the request of the next friend himself. *Jones v. Powell*, 2 Mer. 141. See, further, as to such application, *Fox v. Suwerkrop*, 1 Beav. 583; *Da Costa v. Da Costa*, 3 P. Wms. 140.

<sup>3</sup> *Woolf v. Pemberton*, L. R. 6 Ch. D. 19. See, also, *Rue v. Meirs*, 48 N. J. Eq. 877. But as the conduct of the next friend in the case first cited was not improper, the costs of the application and of the appeal from the refusal to allow it were made costs in the cause. It is error to allow a suit to be prosecuted in the name of infant complainants by their guardian who is himself a complainant and whose interest in the subject-matter of the litigation is antagonistic to that of the infant, even though they might properly be made complainants. *Simpson v. Alexander*, 6 Cold. (Tenn.) 619, 630. In *Lewis v. Nobbs*, L. R. 8 Ch. D. 591, the name of a defendant who was also next friend of the infant plaintiffs, and whose wife was a defendant, was stricken out and liberty was given to the wife to defend separately.

to make an order on him as if he were a party; nor do the rights and interests of the infant ever depend on the conduct of the next friend.<sup>1</sup> It is the duty of the next friend sedulously to watch and protect the interests of the infant involved in the litigation. He is in the conduct of the suit subject to the control of the court, and if he fail to do his duty, or if any other sufficient ground be brought to the knowledge of the court, as if he have an interest in the subject-matter of the litigation antagonistic to the interests of the infant, the court not only has the power, but it is its duty, to remove him and appoint another who may be more faithful or not subject to a similar temptation.<sup>2</sup> One of the duties required of him is that of employing an attorney to conduct the suit, as he is not supposed to be a person learned in the law, and his intervention is by no means designed to dispense with the services of an attorney.<sup>3</sup> He may, in the absence of a regularly constituted guardian, receive money recovered of the defendant, and give a sufficient acquittance therefor and enter satisfaction on the roll.<sup>4</sup> But this latter right is subordinate to that of the guardian; and where such guardian exists, no person other than the guardian himself or some person deriving authority from him can legally receive and receipt for money due the ward.<sup>5</sup> A next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court will see to it that they are not bargained away by those assuming or appointed to represent him. But this rule does not prevent the guardian *ad litem* or next friend from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. Thus, he may consent that an appeal be heard in a particular circuit or at an earlier term than if such consent had not been given, or waive the execution of an appeal bond by the opposite party.<sup>6</sup> A next friend is entitled to be reimbursed out of

<sup>1</sup> *Dyke v. Stephens*, L. R. 30 Ch. D. 189. See, also, *Baltimore &c. R. Co. v. Fitzpatrick*, 36 Md. 619.

<sup>2</sup> *Simpson v. Alexander*, 6 Cold. (Tenn.) 619. See, also, *Kingsbury v. Buckner*, 134 U. S. 650, 679; *Sinclair v. Sinclair*, 13 M. & W. 640; *Deford v. State*, 30 Md. 179.

<sup>3</sup> *Collins v. Brook*, 4 H. & N. 270.

<sup>4</sup> *White v. Hall*, Moor. 852; *Morgan v. Thorne*, 7 M. & W. 400; *Collins v. Brook*, 4 H. & N. 270; s. c., 5 H. & N. 700.

<sup>5</sup> *Baltimore &c. R. Co. v. Fitzpatrick*, 36 Md. 619.

<sup>6</sup> *Kingsbury v. Buckner*, 134 U. S. 650, 680, 681.

the estate of the person in whose behalf he sues, though his suit is unsuccessful, if it appears that he acted in good faith and with reasonable caution, and simply with a view to protect a person who was unable to protect himself.<sup>1</sup>

§ 46. **Infant's rights upon attaining majority.**— If a suit is improperly brought in behalf of an infant and he elects to abandon it when he becomes of age, he may apply to the court for a reference to ascertain the fact, and the bill will then be dismissed, with costs to be paid by the next friend.<sup>2</sup> But if the suit was properly brought, the infant upon abandoning the suit must pay the costs of the next friend and also those of the adverse party.<sup>3</sup> If he elects to proceed in the cause after he is of age, the next friend is discharged from his liability and the infant will be liable in the same manner as if the suit had been commenced by an adult.<sup>4</sup> But where a decree has been made during his infancy, the suit cannot be abandoned, although it was not brought in good faith and was against his interest. In such a case, if the infant applies in time, the court may compel the next friend to remunerate him for the costs and expenses to which his estate has been improperly subjected, although he is compelled to proceed under the decree.<sup>5</sup> And if the infant upon arriving at majority affirms the act of his next friend by voluntarily proceeding in the case, he cannot afterward insist that it was improperly brought.<sup>6</sup>

<sup>1</sup> Voorhees v. Polhemus, 86 N. J. Eq. 456.

<sup>2</sup> Waring v. Crane, 2 Paige, 79; Guy v. Guy, 2 Beav. 460. See, also, Sale v. Sale, 1 Beav. 586; Fox v. Suwerkrop, 1 Beav. 588.

<sup>3</sup> Waring v. Crane, 2 Paige, 79; Anon., 4 Madd. 461.

<sup>4</sup> Waring v. Crane, 2 Paige, 79.

<sup>5</sup> Waring v. Crane, 2 Paige, 79.

<sup>6</sup> Waring v. Crane, 2 Paige, 79. Touching the matter of costs, it was also said in that case: — "If a bill is filed on behalf of an infant by his next friend, and the bill is dismissed or a decree is made in the cause before the infant is of age, he

cannot be personally charged with the costs. They are to be charged against the next friend, unless there is a fund under the control of the court belonging to the infant, in which case the court may direct the costs to be paid out of that fund. Taner v. Ivie, 2 Ves. Sr. 466. But the costs will not be charged on the infant's estate unless the court is satisfied the suit was brought in good faith and with a *bona fide* intent to benefit the infant. Pearce v. Pearce, 9 Ves. 547; Whitaker v. Marljar, 1 Cox's Cas. 285. In Turner v. Turner, 2 P. Wms. 297, the next friend died before a decree in the cause, and after

§ 47. **Suits against infants.**—Where a suit is brought against an infant it is not necessary to join any other person with him;<sup>1</sup> but when an infant is a defendant in a suit, or a respondent in a petition,<sup>2</sup> the court will appoint a proper person, who ought not to be a mere volunteer,<sup>3</sup> and is usually the nearest relation not concerned in interest in the matter in question,<sup>4</sup> to put in his defense for him and generally to act on his behalf in the conduct and management of the case. The person so appointed is generally styled the guardian *ad litem*, to distinguish him from the guardian of the person or of the estate.<sup>5</sup> The practice is to serve the bill on the in-

the infant became of age he refused to proceed in the suit and the bill was dismissed against him with costs. But on a rehearing in that case, Lord King reversed his former decree as to costs and decreed that the infant was not liable therefor. *s. c.*, 2 Strange, 708." The coming of age of an infant party does not abate the suit; nor does it render a supplemental bill necessary, unless his interest in the subject of the suit is changed by that event. Where an infant defendant coming of age neglects to appear by a solicitor in the place of his guardian, the complainant must apply for an order that he appoint a solicitor, as in cases of the death or removal of the solicitor of a party. *Campbell v. Bowne*, 5 Paige, 34.

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 160. Infants cannot be made parties to a bill for the sake of discovery merely, as they do not answer on their oaths. *Leggett v. Sellou*, 8 Paige, 84.

<sup>2</sup> In petitions "in a matter" against an infant, a guardian *ad litem* must be appointed. *In re Barrington*, 27 Beav. 272.

<sup>3</sup> *Foster v. Cantley*, 10 Hare, App. 24; *s. c.*, 17 Jur. 870.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 70; 1 Daniell's Ch. Pr. (5th ed.) 160; *Bank of United States v. Ritchie*, 8

*Peters*, 128; *Grant v. Van Schoonhoven*, 9 Paige, 255. Equity rule 87 of the United States Supreme Court provides that "guardians *ad litem* to defend a suit may be appointed by the court or by any judge thereof for infants or other persons who are under guardianship or otherwise incapable to sue for themselves."

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 160; *Swan v. Horton*, 14 Gray, 179. Guardians *ad litem* are only appointed in behalf of infant defendants. *Clark v. Platt*, 80 Conn. 282. A decree against an infant without assigning a guardian *ad litem* is erroneous. *Swan v. Horton*, 14 Gray, 179; *Roberts v. Stanton*, 2 Munf. 129; *Irons v. Crist*, 8 A. K. Marsh. 143; *St. Clair v. Smith*, 8 Ham. 368; *Ewing v. Highbee*, 7 Ham. 198. Certain minors were served, but no petition for a guardian *ad litem* was presented and no appointment was made. Their father filed an answer as guardian *ad litem*, with a formal consent to act as such guardian. The decree was sustained. *Simmons v. Baynard*, 80 Fed. Rep. 532. In *Bulow v. Buckner*, Rich. Eq. 401, realty in which infants were interested was sold and the sale sustained although the infants themselves were not before the court. In *Bulow v. Witte*, 8 S. C. 818, infants were not served with



fant when he has no guardian, and then appoint a guardian to answer the bill; but if the guardian has not had a copy of the bill, time will be given him to answer.<sup>1</sup> Where a guardian *ad litem* was appointed for a defendant who was stated to be an infant, but was in reality of full age, and a decree and accounts were taken on that footing, they were held not to be binding on the defendant. The defect was remedied, however, by giving leave to the plaintiffs to file a supplemental bill.<sup>2</sup>

§ 48. The same subject continued — Guardian *ad litem*.— The appointment of a guardian *ad litem* is made upon petition presented in his name, supported by an affidavit of the infant's solicitor that the proposed guardian has no interest in the matters in question in the suit adverse to that of the infant, and it should also appear by the same or some other affidavit that he is a fit and proper person.<sup>3</sup> The application

process in proceedings involving their rights to realty, yet they were held to be bound because the attention of the court was called to the fact and on its motion a guardian *ad litem* had been appointed. See, also, *Day v. Kerr*, 7 Mo. 426; *Jackson v. Jackson*, 2 Tenn. Leg. Rep. 275; *Greenlaw v. Kernehan*, 4 Sneed, 371; *Hopper v. Fisher*, 2 Head, 153; *Smith v. McDonald*, 42 Cal. 484. When the infant is a married woman it is nevertheless necessary to appoint a guardian, and it is customary to appoint her husband if he is a defendant with her. 1 *Daniell's Ch. Pr.* (5th ed.) 163; *Colman v. Northcote*, 2 Hare, 147; *O'Hara v. MacConnell*, 93 U. S. 150. In Massachusetts and Tennessee the infant is deemed to be sufficiently represented by his general or probate guardian, unless the interests of the latter conflict with those of his ward. *Parker v. Lincoln*, 12 Mass. 13, 19; *Mansur v. Pratt*, 101 Mass. 60. And so the practice seems to be in Connecticut. *Colt v. Colt*, 111 U. S. 566.

<sup>1</sup> *Jones v. Drake*, 2 Hayw. (N. C.)

420; *Carrington v. Brents*, 1 McLean, 167; *Walker v. Hallett*, 1 Ala. 379. Where it is sought to charge the real estate of an infant, he should be made a defendant and not a complainant, although he may be interested in the charge when raised. *Simpson v. Alexander*, 6 Cold. (Tenn.) 619. Infants must be made parties to bills affecting their real estate, and making the guardian a party is not sufficient. *Wakefield v. Marr*, 65 Me. 841; *Tucker v. Bean*, 65 Me. 352. See *Britain v. Cowen*, 5 Humph. (Tenn.) 815. A personal decree against an infant, after a guardian *ad litem* had been appointed, in a suit in a United States court and not involving property, was held to be void even in collateral proceedings, where no actual service of process was made on the infant. The court said:—"It may be otherwise in the State courts." *New York Life Ins. Co. v. Bangs*, 103 U. S. 435.

<sup>2</sup> *Green v. Bradley*, 7 Beav. 271.

<sup>3</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 161; *Braithwaite's Pr.* 46, 47.



is made after appearance for the infant.<sup>1</sup> If no application be made in the infant's behalf, the complainant may apply upon motion and notice for that purpose.<sup>2</sup> The consent of the infant is not necessary,<sup>3</sup> but the infant, if above the age of fourteen years, should be consulted in the appointment and his nomination approved, unless there be some good reason for rejecting it;<sup>4</sup> and the guardian must accept the appointment, and the fact should appear of record.<sup>5</sup> The court will not select a guardian nominated by the complainant.<sup>6</sup> A co-defendant may be appointed if he has no adverse interest, but the complainant, a married woman or a person out of the jurisdiction cannot be appointed.<sup>7</sup> If the guardian dies pending the suit, a new guardian must be appointed in the same manner as the original guardian.<sup>8</sup> The guardian must put in a proper defense and is liable for the costs of a scandalous or impertinent answer.<sup>9</sup> He is at all times subject to removal by the court for neglect of duty, and may be liable to the infant for damages sustained thereby.<sup>10</sup> It was held by the United States circuit court that it had power to remove a guardian *ad litem* or next friend who was unwilling or unable

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 162; *Lushington v. Sewell*, 6 Mad. 28.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 162. As to service of notice see *Taylor v. Ansley*, 9 Jur. 1055; *Christie v. Cameron*, 2 Jur. (N. S.) 685; *Hitch v. Wells*, 8 Beav. 576. A peremptory order, obtained by the complainant, for the appointment of a guardian *ad litem* for the infant defendants is regular; so far, at least, as to protect the title of the purchaser under the decree. *Concklin v. Hall*, 2 Barb. Ch. 136, where it is said that the usual practice is to grant an order *nisi* appointing some suitable person guardian *ad litem*, unless the defendant within ten days after service of a copy of the order procures the appointment of another person.

<sup>3</sup> *Beddinger v. Smith* (Ark.), 18 S. W. Rep. 734.

<sup>4</sup> *Walker v. Hallett*, 1 Ala. 879. But

the appointment of the same person as master and guardian *ad litem* would be improper.

<sup>5</sup> *Daniel v. Hannagan*, 5 J. J. Marsh. (Ky.) 49.

<sup>6</sup> *Knickerbocker v. De Freest*, 2 Paige, 304. Upon an application to sell the estate of an infant under the statute, the court will appoint his general guardian, if he has one, as the special guardian. *In re Wilson*, 2 Paige, 412.

<sup>7</sup> 1 Daniell's Ch. Pr. (5th ed.) 161.

<sup>8</sup> 1 Daniell's Ch. Pr. (5th ed.) 163.

<sup>9</sup> 1 Daniell's Ch. Pr. (5th ed.) 168; *Foster's Federal Practice* (2d ed.), § 89. For "practical suggestions to guardians *ad litem*" see *Gibson's Suits in Chancery*, § 148.

<sup>10</sup> Daniell's Ch. Pr. (5th ed.) 168; *Knickerbocker v. De Freest*, 2 Paige, 304.

to protect the minor by paying the costs of litigation, and to appoint some person of substance who would discharge those ordinary duties of that relation; or that it might suspend further proceedings against the minor until it could send a next friend or guardian *ad litem* to the State courts having jurisdiction of the infant's person and property, to secure such guardianship as would protect him.<sup>1</sup> Where the interests of the infant require it, the guardian will be directed to employ counsel approved by the court to represent him.<sup>2</sup> The court will protect the rights of infants where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf.<sup>3</sup>

§ 49. Suits on behalf of idiots, lunatics and persons of weak mind.—Suits on behalf of a lunatic are usually instituted in the name of the lunatic,<sup>4</sup> who sues by his committee or guardian, if he has any, or if none, by his next friend, who is responsible for the conduct of the suit.<sup>5</sup> It is not a good plea to a bill that the complainant "was at the time of the commencement of the suit *non compos mentis* and incapable to sue," without alleging that he has been so found by inquisition or that any committee has been appointed.<sup>6</sup> "The proper practice in such a case is by an application to the court to

<sup>1</sup> Ferguson v. Dent, 15 Fed. Rep. 771.

<sup>2</sup> Colgate v. Colgate, 28 N. J. Eq. 378.

<sup>3</sup> Stephens v. Van Buren, 1 Paige, 479. Where an infant heir, against whom a specific performance is asked, has derived no other property except that which he is decreed to convey, from the person from whom the premises have descended, the costs of the guardian *ad litem* of the infant must be paid by the complainant. Sutphen v. Fowler, 9 Paige, 280.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 82. See, also, Rankin v. Warner, 2 Lea, 805.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 82, 83. It seems that in New Jersey a bill cannot be filed by a next friend unless specially authorized by the court.

Dorsheimer v. Rorback, 18 N. J. Eq. 480, where a bill filed by a volunteer without such authority was taken from the files. "A lunatic ordinarily sues only by his committee or guardian. But if the guardian has an interest adverse to that of the lunatic, he may sue by the attorney-general, or by next friend specially appointed by the court." Melick v. Melick, 17 N. J. Eq. 159; Norcom v. Rogers, 16 N. J. Eq. 484. A lunatic is not a necessary party plaintiff with his committee on a bill to set aside an act done by the lunatic under mental imbecility; though it is the general practice to join them, it is only matter of form. Ortleby v. Messere, 7 Johns. Ch. 139.

<sup>6</sup> Mitford on Pleading (4th ed.), 229; Dudgeon v. Watson, 23 Fed. Rep. 161.

strike the bill from the files because it has been filed without authority, owing to the mental incapacity of the complainant, or to apply for a stay of proceedings until a committee or next friend may be appointed.<sup>1</sup> The court can then ascertain whether there is any reasonable foundation for suspending the progress of the suit. The defendant has no interest in such an inquiry beyond being protected from a vexatious suit. Any person may volunteer to act as next friend and bring a suit for an insane person when no committee has been appointed.<sup>2</sup> And the court will entertain it and decide its merits<sup>3</sup> against the objections of the defendant. The person thus officiously constituting himself a protector of the lunatic does so at his risk and may be compelled to pay the defendant's costs, and must establish the propriety of his act if called to account by a committee subsequently appointed. The solicitor who files a bill assumes the same responsibility.<sup>4</sup> If a complainant appear upon the face of the bill to be an idiot or lunatic, and no next friend or committee is named in the bill, the objection may be raised by demurrer or by motion to take the bill from the files.<sup>5</sup> Where persons are incapable of acting for themselves, although not strictly either idiots or lunatics, the suit may be brought in their name, and the court will authorize some suitable person to carry it on as their next friend.<sup>6</sup>

**§ 50. Suits against idiots, lunatics and persons of weak mind.**—Idiots and lunatics defend a suit by their committees, who are by an order of court appointed guardians *ad litem* for that purpose, as a matter of course, in ordinary circumstances,<sup>7</sup>

<sup>1</sup> *Wartnably v. Wartnably*, 1 Jac. 377; *Attorney-General v. Tyler*, 2 Eden, 280; *Norcom v. Rogers*, 16 N. J. Eq. 484.

<sup>2</sup> But see *Dorsheimer v. Rorback*, 18 N. J. Eq. 488, cited in the second note to this section.

<sup>3</sup> *Jones v. Lloyd*, 48 Law J. (Ch.) 826.

<sup>4</sup> *Wallace, J.*, in *Dudgeon v. Watson*, 28 Fed. Rep. 161.

<sup>5</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 84; *Norcom v. Rogers*, 16 N. J. Eq. 484.

<sup>6</sup> *Story's Equity Pleading* (10th ed.), § 66. A suit which had been instituted in the name of a person in her dotage having been dismissed by her under the influence of the defendant, it was reinstated and directed to be thenceforward prosecuted by her solicitor for her benefit. *Owing's Case*, 1 Bland Ch. (Md.) 370.

<sup>7</sup> *Story's Equity Pleading* (10th ed.), § 70; *New v. New*, 6 Paige, 237. The guardian is usually joined with the lunatic as a co-defendant. *Harrison*

and an order made upon the *ex parte* application of the committee is regular.<sup>1</sup> If there is no committee, or the committee has an interest adverse to that of the lunatic, an order may be obtained by another person as guardian *ad litem* to defend the suit.<sup>2</sup> “Lunatics not so found by inquisition, and persons of weak intellect, or who are by age or infirmity reduced to a second infancy, must defend by guardian, who will be appointed on an application by motion or petition of course, in the name of the person of unsound mind. . . . The application must be supported by affidavits proving the mental incapacity of the defendant, the fitness of the proposed guardian, and that he has no adverse interest.”<sup>3</sup> So if the guardian dies a new one should be appointed in the same manner.<sup>4</sup> If the lunatic recover his reason he may apply on notice to the plaintiff and the guardian and have the order appointing a guardian discharged. Where a defendant is declared a lunatic after the bill is filed, it is the duty of the complainant to have the guardian made a party to the suit.<sup>5</sup>

**§ 51. Husband and wife as parties.**—With a few exceptions<sup>6</sup> a married woman could not sue in law or equity without join-

*v. Rowan*, 4 Wash. C. C. 202. “A lunatic may sue or be sued in person, and may appear or defend by a solicitor of the court like a person *sui juris*. *McDowell v. Morrell*, 5 Lea, 286; *Rankin v. Warner*, 2 Lea, 302. But the more prudent course is to have them sue by next friend when they are complainants, and defend by guardian *ad litem* when defendants.” *Gibson's Suits in Chancery*, § 141.

<sup>1</sup> *New v. New*, 6 Paige, 287. It was held by Chancellor Kent that a creditor of a lunatic might file a bill for payment of his debt against the committee without making the lunatic himself a party. *Brasher v. Van Cortlandt*, 2 Johns. Ch. 242. Where it is necessary for the creditor of a lunatic to file a bill against the committee to establish and obtain satisfaction of a debt out of the lunatic's estate, it seems that the lunatic may

also be made a party defendant in the suit, so as to make the proceedings binding upon him in case he should be restored to the possession of his estate before the termination of the suit. *Beach v. Bradley*, 8 Paige, 146.

<sup>2</sup> *Story's Equity Pleading* (10th ed.), § 70. The order is granted on petition and affidavit, and it is the same where he is respondent to a petition. 1 *Daniell's Ch. Pr.* (5th ed.) 176.

<sup>3</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 176; *Story's Equity Pleading* (10th ed.), § 70.

<sup>4</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 176.

<sup>5</sup> *Search v. Search*, 28 N. J. Eq. 110.

<sup>6</sup> As where the husband was banished or had abjured the realm, or been transported for felony, or had deserted his wife in a foreign country. *Story's Equity Pleading* (10th ed.), § 61.

ing her husband.<sup>1</sup> The rule in the federal courts was declared as follows:—"Where the wife complains of the husband and asks relief against him, she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit as *prochein ami*. This is a matter of practice within the discretion of the court."<sup>2</sup> In cases where she ought to sue by next friend or *prochein ami*, the bill is demurrable if it appears that she does not so sue.<sup>3</sup> But a bill cannot be filed in behalf of a married woman without her consent,<sup>4</sup> unless she is an infant.<sup>5</sup> A married woman entitled to separate property authorized a solicitor to take proceedings in respect to it. The solicitor filed a bill on her behalf in which she and her infant child sued by one next friend, but he did not consult her as to the selection of the next friend. It was held that she was not bound by the proceedings, and a motion to strike out her name was granted without costs.<sup>6</sup> The wife, by her next friend, may file a bill against her husband, or against her husband and a third person, to protect her separate estate, or to prevent her husband and others from depriving her of a support out of property which belongs to her in equity, although the husband has the right at law to sue for and control such property.<sup>7</sup> A bill filed by the husband, in the name of himself and wife, although for a claim in right of his wife, is considered as the bill of the husband. If he dies before a decree in the cause

<sup>1</sup> Story's Equity Pleading (10th ed.), § 61.

<sup>2</sup> *Bein v. Heath*, 6 How. (1848), 228. See *United States v. Pratt Coal & Coke Co.*, 18 Fed. Rep. 708.

<sup>3</sup> *Wills v. Pauly*, 51 Fed. Rep. 257, holding that a State statute permitting her to sue as a *feme sole* cannot affect the practice of the federal courts in equity. In the federal courts provision for the appointment of the next friend is made by Equity rule 87 of the Supreme Court.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 110; *Randolph v. Dickerson*, 5 Paige, 517.

The objection cannot be made by the defendant but must be a next friend on her behalf. *Davies v. Whitehead*, 1 W. N. 163.

<sup>5</sup> *Wortham v. Pemberton*, 1 De G. & S. 644; s. c., 9 Jur. 291; *Phillips v. Hassell*, 10 Humph. (Tenn.) 198.

<sup>6</sup> *Gambée v. Atlee*, 2 De G. & S. 745. The *prochein ami* may be changed on application of the wife, the person substituting giving security for costs already accrued. *Fulton v. Roosevelt*, 1 Paige, 178.

<sup>7</sup> *Dewall v. Covenhoven*, 5 Paige, 581.

the widow may proceed in the suit or not at her election, and if she refuses to proceed she is not liable for costs.<sup>1</sup>

§ 52. **The same subject continued.**—"In practice where the suit is brought by the wife for her separate property, the husband is sometimes made a co-plaintiff. But this practice is incorrect, and in all such cases she ought to sue as sole plaintiff by her next friend, and the husband should be made a party defendant, for he may contest that it is her separate property and the claim may be incompatible with his marital rights."<sup>2</sup>

<sup>1</sup> *Dewall v. Covenhoven*, 5 Paige, 581.

<sup>2</sup> *Story's Equity Pleading* (10th ed.), § 68; *Johnson v. Vaill*, 14 N. J. Eq. 428. The language quoted in the text is a material change from that used in some of the earlier editions of *Story* which was sanctioned by Justice McLean in *Bein v. Heath*, 6 How. 228. See, also, *Tantum v. Coleman*, 26 N. J. Eq. 128; *Tunnard v. Littell*, 23 N. J. Eq. 264. In Massachusetts the statute enables the wife in general terms "to sue and be sued in all matters relating to her property in the same manner as if she were sole," and consequently she is permitted in equity to sue alone, when no interest of her husband is involved. *Forbes v. Tuckerman*, 115 Mass. 115; *Hennessey v. White*, 3 Allen, 48; *Burns v. Lynde*, 6 Allen, 305. The practice which obtained in the English court of chancery has been continued in the chancery division of the high court of justice, and when a married woman institutes proceedings to recover property settled to her separate use in which her husband has no interest, she must sue by her next friend, making her husband a defendant; and where the objection was duly taken, but the defect was not rectified by amendment, at the trial the court ordered the husband to be made a defendant, and in giving judgment for the wife

deprived her of the costs of the pleadings subsequent to the objection. *Roberts v. Evans*, L. R. 38 Ch. D. 830. The practice where the husband unites with the wife is not to dismiss the bill, but to give permission to the wife to amend by adding a next friend, and making the husband a defendant. *England v. Downs*, 1 Beav. 96; *Wake v. Parker*, 2 Keen, 73. Or where no objection is interposed, to decree the fund to be paid to a trustee for the use of the wife. *Griffith v. Wood*, 2 Ves. 452; *Simons v. Harwood*, 1 Keen, 7; *Sigel v. Phelps*, 7 Sim. 239; *Johnson v. Vaill*, 14 N. J. Eq. 424, 426. In *Johnson v. Vaill*, *supra*, where a bill was exhibited and sworn to by the husband as next friend, leave was given to amend by making the husband a party defendant. In the same case it was said:—"If the husband and wife join in a suit as plaintiffs, or in an answer as co-defendants, it will be considered as the suit or the defense of the husband alone; and it will not prejudice a claim by the wife in respect of her separate interest, nor will the wife be bound by any of the allegations therein in any future litigation." Citing *Pawlet v. Delaval*, 2 Ves. Sr. 666; *Mole v. Smith*, 1 Jac. & W. 648; *Hughes v. Evans*, 1 Sim. & Stu. 185; *Reeve v. Dalley*, 2 Sim. & Stu. 464; *Wake v. Parker*, 2 Keen, 73; *England v. Downs*, 1 Beav. 96;

A husband is not a proper party complainant to a bill by his wife for a reconveyance to her of land which she and her husband conveyed to the defendant, and which was then her separate estate.<sup>1</sup> To a bill against a woman as executrix her husband is a necessary party.<sup>2</sup> A wife, though living separate from her husband, even though she has been separated by deed, cannot be sued alone; her husband must be joined, if only for conformity.<sup>3</sup> To a bill by a trustee of a married woman, calling in question the act of her husband in disposing of, as his own, property of which the wife claims to be the owner, the husband is a necessary party.<sup>4</sup> A bill by a married woman to enjoin the foreclosure of a mortgage given by her husband and herself on her land to secure his debt, on the ground that the debt had been paid, was dismissed by stipulation. It was held that the husband had a right during that term to have the dismissal set aside and to be made a party complainant, since he was an indispensable party to the accounting that would be necessary in order to determine whether the debt was paid.<sup>5</sup> A respondent in a foreclosure suit was a married woman. It was held that the objection that her husband should have been joined as a defendant was in the nature of a plea in abatement, and could not be heard

*Sigel v. Phelps*, 7 Sim. 239; *Owden v. Campbell*, 8 Sim. 551.

<sup>1</sup> *Barrett v. Doughty*, 25 N. J. Eq. 379. But leave was given to amend by substituting a proper and responsible person as next friend to the wife and making the husband a party defendant. By virtue of statute in New Jersey a married woman may maintain a suit for specific performance of a contract to convey land to her, in her own name, without joining her husband as a party. *Young v. Young*, 45 N. J. Eq. 28.

<sup>2</sup> *Wood v. Chetwood*, 27 N. J. Eq. 311. But the non-joinder cannot be taken advantage of by general demurrer. *Oliva v. Bunaforza*, 31 N. J. Eq. 395.

<sup>3</sup> *McDermott v. French*, 15 N. J. Eq. 70.

<sup>4</sup> *Pendleton v. Woodhouse* (1874), 24 N. J. Eq. 347. Where it appeared that a contract for purchase of realty was made by a husband, who paid part of the price, and to whom the conveyance was made, the fact that his wife executed her notes for the balance of the price, and gave a trust deed on her individual property to secure them, the notes being delivered by the husband, did not render the husband a trustee for the wife, or make her an indispensable party to a suit by him to rescind the contract, on the ground of fraud. *Wheeler v. Dunn*, 13 Colo. 428; s. c., 22 Pac. Rep. 827.

<sup>5</sup> *Shannahan v. Stevens* (Ill. Sup.), 28 N. E. Rep. 804.



after a trial on the merits.<sup>1</sup> Where a bill was brought by the husband and guardian of an insane woman against the trustee under a marriage settlement, to obtain an order for a contribution from the income of the trust property which was secured to her sole and separate use, to aid in her support, the court appointed a guardian *ad litem* for her before hearing the case.<sup>2</sup> Where a suit at law is brought against the husband and wife for the purpose of affecting her interest, she is a necessary party to a bill in chancery by the husband for an injunction to restrain proceedings in the suit at law.<sup>3</sup> If a *feme sole* marries after suit brought against her, the suit does not abate; and it is only necessary to make a suggestion of the marriage and to obtain an order that the husband and wife be named as parties in the subsequent proceedings.<sup>4</sup>

**§ 53. Suits by and against executors and administrators.** An executor or administrator appointed in one State cannot as such maintain any suit in the courts, either State or national, held in any other State, unless he has taken out letters of administration in the State where the suit is brought.<sup>5</sup> On a bill by an executor a probate of the will taken out before the hearing of the cause is sufficient if no objection is made to the want of it by the pleadings.<sup>6</sup> And an administrator appointed in one State, like an executor who has not proved the will, may sue in the courts of another before he has letters therefrom, and, having obtained letters, may aver the fact

<sup>1</sup> Goodwin v. Keney, 49 Conn. 564.

<sup>2</sup> Davenport v. Davenport, 5 Allen, 464.

<sup>3</sup> Booth v. Albertson, 2 Barb. Ch. 818.

<sup>4</sup> Campbell v. Bowne, 5 Paige, 84.

<sup>5</sup> Johnson v. Powers (1890), 139 U. S. 156; Fenwick v. Sears, 1 Cranch, 259; Stacy v. Thrasher, 6 How. 44, 58; Dixon v. Ramsay, 8 Cranch, 819; Noonan v. Bradley, 9 Wall. 394; Kerr v. Moon, 9 Wheat. 565; Doe v. McFarland, 9 Cranch, 151; Porter v. Trall, 30 N. J. Eq. 106; Black v. Henry G. Allen Co., 42 Fed. Rep. 618; Lawrence v. Lawrence, 8 Barb. Ch. 71, where it is held, however, that

an executor may sue upon a contract made with him as executor without proving that letters testamentary were granted to him. Doolittle v. Lewis, 7 Johns. Ch. 45; Duchesse d'Auxy v. Porter, 41 Fed. Rep. 68; Mills v. Knapp, 39 Fed. Rep. 592; McNamara v. Dwyer, 7 Paige, 289. Cf. Jackson v. Johnson, 34 Ga. 511, 514. Personal representatives cannot sue for assets of the decedent in a State other than the one from which they have derived their authority. Allen v. Fairbanks, 36 Fed. Rep. 402.

<sup>6</sup> Osgood v. Franklin (1816), 2 Johns. Ch. 1.

by amendment before answer filed and after demurrer.<sup>1</sup> If the complainant sues simply as administrator the objection that his title is derived from appointment in another State can be taken only by a plea or answer; but when the defective title is fully shown in the bill, advantage of such defect can be taken by demurrer.<sup>2</sup> Where a bill sets forth affirmatively as the foundation of the right to sue the granting of letters of administration in another State, and nothing else, and the answer puts it in issue, the right of the plaintiff to sue is not admitted, and the defendant may raise such objection at the hearing on the merits.<sup>3</sup> No one can be called to account as an executor unless he has taken out letters of administration in the State where the suit is brought.<sup>4</sup>

§ 54. General rule on the subject of parties.—It is difficult to gather from the decisions a rule on the subject of parties in equity concise yet sufficiently comprehensive to meet every case. While courts of law usually require no more than that the persons directly and immediately interested in the subject-matter of a suit, and whose interests are of a strictly legal nature, should be parties to it, “it is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, so that there may be a complete decree which shall bind them all;”<sup>5</sup> “so

<sup>1</sup> *Black v. Henry G. Allen Co.* (N. Y., 1890), 42 Fed. Rep. 618.

<sup>2</sup> *Black v. Henry G. Allen Co.* (N. Y., 1890), 42 Fed. Rep. 618, 628.

<sup>3</sup> *Mills v. Knapp* (N. Y., 1889), 39 Fed. Rep. 592.

<sup>4</sup> *Rennie v. Crombie*, 13 N. J. Eq. 457, 467; *McNamara v. Dwyer*, 7 Paige, 239. But in *Jackson v. Johnson*, 34 Ga. 511, 514, it is said that the foregoing case cannot be sustained either in principle or authority, and that it is in conflict with *Doolittle v. Lewis*, 7 Johns. Ch. 45. See, also, *Beeler v. Dunn*, 3 Head (Tenn.), 88.

<sup>5</sup> Story on Equity Pleading (10th ed.), § 72, quoted and approved in *Gregory v. Stetson*, 133 U. S. 586;

*Sedgwick v. Cleveland*, 7 Paige, 287; *Keeler v. Keeler*, 11 N. J. Eq. 458; *Dehart v. Dehart*, 8 N. J. Eq. 478; *Lyon v. Sanford*, 5 Conn. 544; *Crocker v. Higgins*, 7 Conn. 842; *Hoxie v. Carr*, 1 Sumner, 173; *Caldwell v. Taggart*, 4 Peters, 190; *Hickok v. Scribner*, 8 Johns. Cas. 311; *Carey v. Hoxie*, 11 Ga. 648; *Hopkirk v. Page*, 2 Brock. 20. Upon a combination of the authorities the following rule is deduced in Calvert on Parties, p. 11:—“All persons having an interest in the object of the suit ought to be made parties,” distinguishing, *ex industria*, the object from the subject of a suit, and explaining that “the test, then, is the interest which

that the court may finally determine the entire controversy and do complete justice by adjudging all the rights involved in it;"<sup>1</sup> so that the decree shall "terminate and not mitigate litigation."<sup>2</sup> But the rule is regulated to some extent by considerations of convenience,<sup>3</sup> and is, moreover, subject to several specific and important exceptions, as will presently be shown. A complainant may sometimes avoid the necessity of making particular persons parties by waiving all claim against them in his bill.<sup>4</sup> But this cannot be done to the prejudice of the rights of others who are defendants in the suit; as, for instance, where it is necessary to take an account against the defendant, and where the latter has a right to have other persons interested in the taking of the account before the court to save the necessity of a future litigation with them.<sup>5</sup>

**§ 55. Summary statement of the rule in the federal courts.**—The following statement of the well-settled doctrine is the latest exposition of the rule in the federal courts on the subject of parties:—"The Supreme Court of the United States divide parties to suits in equity into three classes: first, formal parties; second, necessary parties; third, indispensable parties. Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation. They may be parties or not at the option of the complainant. Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by

a person has in the specific relief prayed." See, also, Story's Equity Pleading (10th ed.), § 72, at p. 75.

<sup>1</sup> *Vetterlein v. Barnes*, 124 U. S. 169, citing *Story v. Livingston*, 18 Pet. 359, 375; *Shields v. Barrow*, 17 How. 130, 139. For the purpose of preventing future litigation. *Speakman v. Tatem*, 45 N. J. Eq. 388, 390.

<sup>2</sup> *Caldwell v. Taggart*, 4 Pet. 190.

<sup>3</sup> Thus where the legal right is entirely technical and no beneficial purpose can be answered by enforcing

ing it, it will not be followed. *Parker v. Stevens*, 8 N. J. Eq. 56.

<sup>4</sup> *Williams v. Williams*, 9 Mod. 299. Equity Rule 50 of the United States Supreme Court provides "that in suits to execute the trusts of a will it shall not be necessary to make the heir-at-law a party, but the plaintiff shall be at liberty to make the heir-at-law a party when he desires to have the will established against him."

<sup>5</sup> *Dart v. Palmer*, 1 Barb. Ch. 92.

a decree which does complete and full justice between them. Such persons must be made parties if practicable in obedience to, the general rule which requires all persons to be made parties who are interested in the controversy in order that there may be an end of litigation; but the rule in the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, to be determined in any competent forum. . . . Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.”<sup>1</sup>

§ 56. Formal parties and parties without interest.—Where a bill was filed on behalf of a wife and her children

<sup>1</sup> Caldwell, J., in *Chadbourne's Ex'rs v. Coe* (1893), 10 U. S. App. 83; citing *Shields v. Barrows*, 17 How. 130, 139; *Ribou v. Railroad Companies*, 16 Wall. 446, 450; *Coiron v. Millandon*, 19 How. 118; *Williams v. Bankhead*, 19 Wall. 563; *Kendig v. Dean*, 97 U. S. 423; *Alexander v. Horner*, 1 McCrary, 634. In the same opinion the learned judge said in explanation of the rule:—"The general rule as to parties in chancery is that parties falling within the definition of necessary parties must be brought in for the purpose to end the whole controversy, or the bill will be dismissed; and this is still the rule in most of the State courts. But in the federal courts this rule has been relaxed. This relaxation resulted from two causes:—first, the limitation imposed upon these courts by the citizenship of the parties; second, by their inability to bring in parties out of their jurisdiction by publication. The extent of the relaxation of the

general rule in the federal courts is expressed in the forty-seventh Equity Rule. [See the appendix to this work.] That rule is simply declaratory of the previous decisions of the Supreme Court on the subject of the rule. The Supreme Court has said repeatedly that notwithstanding this rule, a circuit court can make no decree affecting the rights of an absent person, and that all persons whose interests will be directly affected by the decree are indispensable parties;” citing in addition to the cases *supra*. *The Cole Silver Min. Co. v. Virginia &c. Co.*, 1 Sawyer, 685. Accordingly it was held that a creditor cannot maintain a bill to establish a debt against his alleged debtor, annul the debtor's conveyances and contracts, and appropriate his property and money to the payment of the creditor's alleged debt, without making the debtor a party to the bill seeking such relief.

against her husband and a trustee and purchasers from the latter with notice, for the purpose of enforcing the trusts of a marriage settlement and obtaining an account, it was decided that the husband was a merely formal party, and his joinder could not, by reason of his having the same citizenship as the plaintiffs, oust the jurisdiction of the court.<sup>1</sup> Where persons are made defendants who have no connection with the main controversy, but occupy substantially the position of mere garnishees, and are brought in as parties for the sake of preserving the means whereby the complainants may, if successful in the suit, obtain satisfaction of their demands against the principal defendant, their relation to the suit is of such an incidental nature as to render their citizenship immaterial.<sup>2</sup> So, also, if "the real and only controversy is between citizens of different States or an alien and a citizen, and the plaintiff is by some positive rule of law compelled to use the name of another to perform merely a ministerial act, who has not, nor ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists."<sup>3</sup>

**§ 57. Interested but not indispensable parties.**—The owner of land to which there was an apparent but contested outstanding legal title with an equitable title attached brought an action to divest the title of the equitable claimant, without joining as party defendant the pretended owner of the legal title. The latter was held not to be a necessary party.<sup>4</sup> When

<sup>1</sup> *Wormley v. Wormley*, 8 Wheat. 421.

<sup>2</sup> *Bacon v. Rives*, 106 U. S. 99.

<sup>3</sup> *Walden v. Skinner*, 101 U. S. 577, 589, citing *McNutt v. Bland*, 2 How. 9, 15; *Browne v. Strode*, 5 Cranch, 808; *Coal Company v. Blatchford*, 11 Wall. 172, 177; *Arapahoe County v. Kansas Pac. Ry. Co.*, 4 Dill. 277, 288. Where a bill sought a foreclosure and sale subject to prior mortgages, conceding all that could by any possibility be claimed under them, the trustees of those mortgages were de-

clared to be merely nominal parties. *Pacific R. Co. v. Ketchum*, 101 U. S. 289. See, also, *Taylor v. Holmes*, 14 Fed. Rep. 499; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. 327; *Simms v. Guthrie*, 9 Cranch, 19, 25; *Boon's Heirs v. Chiles*, 8 Pet. 532; *Stewart v. Chesapeake & Ohio Canal Co.*, 1 Fed. Rep. 361.

<sup>4</sup> *Williams v. United States*, 138 U. S. 516, where the court said:—"Doubtless the court has power, when a separate action is instituted against one, to require that the other

a suit is brought against trustees to charge them merely with personal liability for their fraudulent acts, the *cestui que trust* may join all the trustees who have participated in the fraudulent acts of which he complains, or he may proceed against one or more of them severally at his election. The right of action in such cases arises *ex delicto*, and in equity as well as at law the tort may be treated as several or joint, at the election of the injured party. Such a case supplies an exception to the rule that in suits against trustees all of the trustees must be made parties.<sup>1</sup> But if it is sought to restrain the defendants from participating in acts which they and their co-trustees are about to perform, the latter have a right to be heard before they shall be wholly prevented by an injunction against the defendants from doing what they propose.<sup>2</sup>

§ 58. Omission of parties not within the jurisdiction.—The United States Revised Statutes<sup>3</sup> provide as follows:—“Where there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor volunta-

party be brought into the suit, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title in one action; but such right does not oust the jurisdiction of the separate action against either.” See, also, *Story v. Livingston*, 13 Pet. 859. “Where a person is interested in the controversy but will not be directly affected by a decree made in his absence he is not an indispensable party, but he should be made a party, if possible; and the court will not proceed to a decree without him if he can be reached.” *Williams v. Bankhead*, 19 Wall. 571; quoted as above and applied in *Hays v. Humphreys* (Mo.,

1889), 37 Fed. Rep. 283, 285. Where the interest of a party who is omitted is separable the relief granted will always be so modified as not to affect his interests. *Mechanics' Bank v. Seton*, 1 Pet. 299; *Cameron v. McRoberts*, 3 Wheat. 591.

<sup>1</sup> *Wall v. Thomas*, 41 Fed. Rep. 620, 621; *Boyd v. Gill*, 19 Fed. Rep. 145; *Hazard v. Durant*, 19 Fed. Rep. 471, 476; *Cunningham v. Pell*, 5 Paige, 607; *Parsons v. Howard*, 2 Woods, 1, 5; *Heath v. Erie Ry. Co.*, 8 Blatchf. 345, 347; *Franco v. Franco*, 3 Ves. 75; *Wilkinson v. Parry*, 4 Russ. 272.

<sup>2</sup> *Wall v. Thomas*, 41 Fed. Rep. 620.

<sup>3</sup> U. S. Rev. St., § 737.



rily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit." Equity Rule 47 of the United States Supreme Court also provides:—"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the absent parties." Notwithstanding these provisions the court can make no decree affecting the rights of an absent person, and none between the parties before it which so far involves and depends upon the rights of an absent person that complete and final justice cannot be done between the parties present without affecting those rights.<sup>1</sup> The objection may be taken at any time upon the hearing or in the appellate court.<sup>2</sup>

**§ 59. Necessary parties illustrated.**—In a bill to enjoin a city from paying its officers, both the city<sup>3</sup> and the officers<sup>4</sup> are necessary parties.<sup>5</sup> On a bill to set aside a transfer of

<sup>1</sup> *Wall v. Thomas*, 41 Fed. Rep. 620, 621; *Gregory v. Swift*, 39 Fed. Rep. 708; *Conolly v. Wells*, 33 Fed. Rep. 205; *Gregory v. Stetson*, 133 U. S. 579, 587. The statute is only a legislative affirmation of the rule previously established by decisions, and does not warrant a decree in the absence of indispensable parties. *Shields v. Barrow*, 17 How. 130.

<sup>2</sup> *Coiron v. Millandon*, 19 How. 113. See, also, *Herndon v. Ridgway*, 17 How. 424. In an action against a corporation and its officers, in which relief is sought against the corporation and discovery from the officers, the latter are not merely nominal parties. *Doyle v. San Diego Land & Town Co.*, 43 Fed. Rep. 349.

<sup>3</sup> Although the city assumed the defense of the case through its attorney, so long as it did not appear on the record, no decree could be passed in the cause. *Samis v. King*, 40 Conn. 300; citing *Allen v. Turner*, 11 Gray, 436, where a town was held to be a necessary party to a bill to restrain its treasurer from paying out money voted at legal meetings for illegal purposes.

<sup>4</sup> *Butcher v. Camden*, 29 N. J. Eq. 478; *Bingham v. Camden*, 29 N. J. Eq. 469.

<sup>5</sup> A stockholder applied for an injunction to prevent the execution of a contract between connecting railroads for the division of earnings on freight and passengers carried over



property alleged to have been obtained by duress, persons in whose favor certain charges on the lands thereby conveyed were made are necessary parties.<sup>1</sup> Depositors cannot proceed against the directors of a savings bank for losses occasioned by their neglect and misconduct without making the corporation a party.<sup>2</sup> Where heirs-at-law claim a fund in court on the ground that it is to be treated as real estate, the administrator of the ancestor through whom they claim is a necessary party to the procedure.<sup>3</sup> Where a landlord seized crops liable to a factor's lien, in an action by the latter for an accounting the lessees are necessary parties.<sup>4</sup> In a suit by stockholders of a railroad company to prevent a trust company, to whom a mortgage on the road has been given, from delivering some of the bonds secured by the mortgage, and to have such bonds canceled, the trust company is a necessary party to the controversy.<sup>5</sup> When a bill seeks to enforce a vendor's lien for the unpaid purchase-money of land, which was sold for distribution among the heirs of the deceased owner under a decree of the probate court, all the persons in whom the legal title was vested are necessary parties.<sup>6</sup> To a suit brought by a judgment debtor seeking to have another judgment set off against the judgment against him, attorneys of the judgment creditor who claim an interest in the judgment are entitled to be made parties.<sup>7</sup> On a bill to recover possession of real estate, the heirs of a deceased claimant are necessary parties.<sup>8</sup> Equity will not decree the surrender for cancellation of an instrument against one who only holds it as bailee or depositary unless the real owner of it is joined as defendant.<sup>9</sup> To a suit to subject, under an attachment, an in-

such road, making only the company of which he was a stockholder a defendant. It was held that the other company was a necessary party. *Elkins v. Camden & Atlantic R. Co.*, 36 N. J. Eq. 241.

<sup>1</sup> *Probasco v. Probasco*, 30 N. J. Eq. 63.

<sup>2</sup> *Chester v. Halliard*, 36 N. J. Eq. 313. See, also, *Deerfield v. Nims*, 110 Mass. 115; *Lyman v. Bonney*, 101 Mass. 562; *Cunningham v. Pell*, 5 Paige, 607; *Robinson v. Smith*, 8

*Paige*, 222; *Porter v. Sabin*, 36 Fed. Rep. 475.

<sup>3</sup> *Cox v. Roome*, 36 N. J. Eq. 317.

<sup>4</sup> *Saloy v. Bloch*, 136 U. S. 338; s. c., 10 S. C. Rep. 996.

<sup>5</sup> *Mayor v. Denver &c. R. Co.*, 41 Fed. Rep. 723.

<sup>6</sup> *Gardner v. Kelso*, 80 Ala. 497.

<sup>7</sup> *Candle v. Rice*, 62 Ga. 215; s. c., 8 S. E. Rep. 7.

<sup>8</sup> *Theurer v. Brogan*, 41 Ark. 88.

<sup>9</sup> *Edwards v. Brightly (Pa.)*, 12 Atl. Rep. 91.

terest of a distributee in property in the hands of an executor, the distributee is a necessary party.<sup>1</sup> A deed conveying real estate cannot be reformed in a suit to which the owners are not parties.<sup>2</sup> All parties interested in the taking of an account must be made parties to a bill in which it is to be taken.<sup>3</sup> A mortgagee of the defendant is a necessary party to a suit against him for the removal of a party-wall.<sup>4</sup> On a bill filed by an heir to avoid the deed of his ancestor, it is necessary that all the heirs of the grantor should be parties to the bill.<sup>5</sup> If one of several joint mortgagees dies his representatives must be made parties to a bill affecting the rights or interests of the mortgagees. Such a bill cannot be filed by or against the survivors only.<sup>6</sup> To enable the court to settle the question in a suit between a mortgagee and a judgment creditor, whether an execution has been issued for more than was actually due upon the judgment, the judgment debtor is a necessary party.<sup>7</sup> Upon a bill filed by the United States, proceeding as ordinary creditors against the debtor of their debtor for an account, etc., the original debtor to the plaintiff ought to be made a party, and the account taken between him and his debtor.<sup>8</sup> Where the defense to a suit at law is common to all the defendants in such suit, they are all necessary parties to a bill for an injunction to stay the proceedings at law.<sup>9</sup> Where a suit involves the construction and effect of the residuary clause in a will, the residuary legatees, being directly interested, are necessary parties.<sup>10</sup>

**§ 60. Improper parties illustrated.**—No person should be made a party who has no interest in the suit, from whom nothing is demanded, and against whom no decree can be had

<sup>1</sup> *Drake v. Delliker*, 24 Fed. Rep. 527.

<sup>2</sup> *Watson v. Chicago &c. Ry. Co.* (Minn.), 48 N. W. Rep. 1129. See, also, *Vance v. Roberts* (Ga.), 12 S. E. Rep. 653.

<sup>3</sup> *McCabe v. Bellows*, 1 Allen, 269, 270. See, also, *Wilcox v. Pratt*, 125 N. Y. 688; s. c., 25 N. E. Rep. 1091. A partner who has sold his interest to another partner is not a necessary party to an action for an accounting

of the affairs of the partnership. *Kilbourn v. Sunderland*, 130 U. S. 505.

<sup>4</sup> *Everett v. Edwards*, 149 Mass. 588.

<sup>5</sup> *Young v. Bilderback*, 8 N. J. Eq. 206.

<sup>6</sup> *Smith v. Trenton Del. Falls Co.*, 4 N. J. Eq. 508.

<sup>7</sup> *Warner v. Paine*, 8 Barb. Ch. 630.

<sup>8</sup> *United States v. Howland*, 4 Wheat. 108.

<sup>9</sup> *Paterson v. Bangs*, 9 Paige, 627.

<sup>10</sup> *Read v. Patterson*, 44 N. J. Eq. 211.

at the hearing, or who in fact is merely a witness in the case.<sup>1</sup> It is on this ground that agents, as a rule, are not joined with the principal.<sup>2</sup> The owner of land to which there is an apparent but contested outstanding legal title with an equitable title attached may bring an action to divest the title of the equitable claimant without joining as party defendant the pretended owner of the legal title.<sup>3</sup>

**§ 61. Joinder of officers of corporations as defendants.—** There can be no discovery by a corporation unless its officers or agents who know the facts are made parties.<sup>4</sup> It has been

<sup>1</sup> Colonial Mortgage Co. v. Hutchinson Mortgage Co., 44 Fed. Rep. 219, 228; Mechanics' Bank v. Seton, 1 Pet. 299, 306; Kerr v. Watts, 6 Wheat. 550, 559; Van Keuren v. McLaughlin, 21 N. J. Eq. 163, 165; Cubberly v. Cubberly, 33 N. J. Eq. 82, 86. The vendor's mortgagee is not a proper party to a suit to rescind a contract of sale, as he is not concerned in the transactions between the vendor and vendee; the land being always subject to his claim. Orendorff v. Tallman (Ala.), 7 So. Rep. 821.

<sup>2</sup> Woolstein v. Welch, 42 Fed. Rep. 566, 567; Shaver v. Lawrence County, 44 Ark. 225; Estes v. Worthington, 30 Fed. Rep. 465. The defendant recovered from an insurance company the amount of a policy on her husband's life. The complainant was her solicitor in that suit. The insurance company paid the complainant by its check the amount of the taxed costs in the suit, and gave him also another check, certified by the bank on which it was drawn, for the amount due defendant, and drawn payable to her order. In a controversy between her and her solicitor over his share of the proceeds of the latter check, a demurrer, on account of his having made the insurance company a defendant, was allowed with costs. Hassell v. Van Houten,

89 N. J. Eq. 113. In a suit to cancel a lease and promissory notes given for the rent under it, it appeared that the lease was made by one assuming to be agent of the owner in his own name, and there was no responsible principal; and that the notes were executed to him and he had negotiated some of them. It was held that he was the proper party defendant. Potter v. Bassett, 85 Mo. App. 417.

<sup>3</sup> Williams v. United States, 138 U. S. 514, 516. Persons who have no interest in the subject-matter of a bill for relief on the ground of fraud and are not the agents or *cestuis que trust* of the party who has the interest should not be made parties defendant, although they participated in the fraud. Norris v. Atlas Steamship Co., 37 Fed. Rep. 424.

<sup>4</sup> Manchester F. Assur. Co. v. Stockton &c. Works (Cal., 1889), 38 Fed. Rep. 378; Fulton Bank v. Sharon Canal Co., 1 Paige, 219; Vermilyea v. Fulton Bank, 1 Paige, 37; Virginia &c. Min. Co. v. Hale (Ala.), 9 So. Rep. 256; Norris v. Atlas Steamship Co., 37 Fed. Rep. 424. See, however, Colonial &c. Mortgage Co. v. Hutchinson Mortgage Co., 44 Fed. Rep. 219, 228. The former as well as the present officers of a corporation can be made parties to a suit against such corporation and compelled to

the practice in the federal courts ever since patent litigation commenced, when a corporation is charged with infringement, to join the chief executive officer of the corporation as a defendant,—that is, charging the corporation and the officer in general terms with the infringement. The reason is that an injunction or other order of the court is much more apt to secure obedience if directed to an individual officer by name than if it only ran against the agents and officers of the corporation by that general description.<sup>1</sup>

**§ 62. When personal representatives may be omitted.**—When it is suggested by the bill that a personal representative is a necessary party, and the bill further recites that the representation is in contest in the appropriate tribunal,<sup>2</sup> or that there are no representatives on the estates of the decedents, an objection for want of proper parties will not hold.<sup>3</sup>

make a discovery of facts within their knowledge. *Fulton Bank v. Sharon Canal Co.*, *supra*. Where the complainant makes an officer of a corporation a party defendant for the purpose of obtaining a discovery as against the corporation, no relief, either general or special, should be prayed against such officer. The prayer of the bill should be so framed as to show distinctly that the relief sought is intended to be confined to the corporation, and that no relief whatever is to be asked as to the officer of the corporation at the hearing, even as to costs. *McIntyre v. Trustees*, 6 Paige, 239.

<sup>1</sup> *Cleveland Forge & Co. v. U. S. Rolling-Stock Co.*, 41 Fed. Rep. 476.

<sup>2</sup> *Plunkett v. Penson*, 2 Atk. 51. See, also, *D'Aranda v. Whittingham*, Moseley, 84; *Carey v. Hoxey*, 11 Ga. 652; *Atkinson v. Henshaw*, 2 Ves. & B. 85; *Jones v. Frost*, 3 Mad. 1.

<sup>3</sup> *Vann v. Hargett*, 2 Dev. & B. Eq. (N. C.) 31. That was a case on a bill filed by part of the persons interested in an executory devise against cer-

tain relations likewise interested, omitting the representatives of those who were deceased and alleging the want of administration on their estates as an excuse. The court said:—“The rights of the plaintiffs, which may be asserted under a decree in this case as just demands, will hereafter be binding on those interested who are not now parties to this bill. But those not parties will not be bound by any account taken in this case until they have an opportunity to contest the facts. *Good v. Blewitt*, 19 Ves. 386; *Angell v. Haddon*, 1 Mad. 529. This may be an inconvenience to the defendants; but a greater inconvenience would exist on the other side if the plaintiffs should be entirely deprived of their rights, because, according to the old rule, all interested were not parties when the plaintiffs show that it is impracticable to make them parties. The law will not force the plaintiffs to be at the responsibility of administering on the estates of all the relations.”

§ 63. **Suits on behalf of numerous parties.**— “The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may be also maintained against a portion of a numerous body of defendants representing a common interest.”<sup>1</sup> How far such persons should be made parties to the suit depends largely upon the discretion of the court, considering on the one hand the difficulty and expense of joining them, and on the other the paramount importance of having such a representation of the interests concerned as may enable the question at issue to be fairly tried.<sup>2</sup> Where a suit is brought by or against a few as representing a numerous class, it is absolutely essential that the fact must be distinctly alleged of record so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all.<sup>3</sup>

<sup>1</sup> *Smith v. Swornstedt*, 16 How. 288; *Gates v. Boston &c. R. Co.*, 58 Conn. 333, 349.

<sup>2</sup> *Smith v. Williams*, 116 Mass. 510, 512; *Stevenson v. Austin*, 8 Met. 474; *Harvey v. Harvey*, 4 Beav. 215; s. c., 5 Beav. 184. “Who are proper parties to a bill is often a nice question, and while the rule as a general one requires that all persons must be made parties who have an interest in the decree which must be made, yet even this has its exceptions, and will be controlled and regulated in the discretion of the court. There are cases where the inconveniences would be so great to bring a large number of defendants before the court that it has been dispensed with from the necessity of the case.” *Stillwell v. M’Neely*, 2 N. J. Eq. 305, 307. Where there are many persons having claims on a fund, and the shares of a part cannot be determined until the rights of all the others are settled and ascertained, as in the case of residuary legatees, or creditors of an

insolvent estate, all must be made parties; or they must have an opportunity of coming in and substantiating their claims before any distribution of the fund can be made. In such cases, if the fund is in court, or under the exclusive control of the parties actually before the court, it will be sufficient for any of the parties having a separate claim upon the fund to file a bill in behalf of themselves and all others who may elect to come in under the decree. *Hallett v. Hallett* (1829), 2 Paige, 15.

<sup>3</sup> *McArthur v. Scott*, 113 U. S. 840; *Leigh v. Thomas*, 2 Ves. 313; *Ogilvie v. Knox Ins. Co.*, 2 Black, 539; *Brown v. Ricketts*, 3 Johns. Ch. 553, 555, 556; *Hallett v. Hallett*, 2 Paige, 15; *Ex parte Jordan*, 94 U. S. 248; *Fish v. Howland*, 1 Paige, 20; *March v. Eastern R. Co.*, 40 N. H. 566; *Crocker v. Craig*, 46 Me. 327; *Boxy v. McKay*, 4 Sneed, 286; *Fletcher v. Holmes*, 40 Me. 364; *Lanchester v. Thompson*, 5 Madd. 4, 13; *Calvert on Parties*, 44, 169. But the court will generally al-

§ 64. **The same subject continued.**— A bill was brought by an heir “for himself and in behalf of all others interested in the subject of the suit” to enforce a trust. It appeared upon the face of the bill that the names and residences of all the parties in interest were known to the complainants, that six persons owning more than one-fourth of the fund resided within the jurisdiction, and the others, twenty-one in number, in various States, and that complainant’s share was only one sixty-fourth part of the fund, amounting to less than \$10. “Upon such a state of facts,” said the court, “it would be unjust to try the merits of the case without giving any of the parties an opportunity to be heard,” and a demurrer was sustained.<sup>1</sup> So in an English case, where there were only twenty creditors interested in certain real estate, Vice-chancellor Wigram declined to permit a few to be made defendants as representatives of all, those interested not being so numerous as to make it a proper case for the application of a principle grounded upon convenience.<sup>2</sup>

low such an averment to be added by amendment at the hearing. *Richmond v. Irons*, 121 U. S. 27, 51; *Williams v. Jones*, 28 Mo. App. 182. Equity rule 48 of the United States Supreme Court provides as follows: — “When the parties on either side are very numerous and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the receiver shall be without prejudice to the rights and claims of all the absent parties.”

<sup>1</sup> *Smith v. Williams*, 116 Mass. 510, 512.

<sup>2</sup> *Harrison v. Stewardson*, 2 Hare, 580. See, also, *Johnson v. Candage*, 31 Me. 28; *Hoe v. Wilson*, 9 Wall.

501; *Stevenson v. Austin*, 3 Met. 474. Cf. *Murphy v. Jackson*, 5 Jones’ Eq. (N. C.) 11; *Corry v. Trist*, Ld. Red. 167; *Smart v. Bradstock*, 7 Beav. 500; *Weld v. Bonham*, 2 S. & S. 91. Where complainant sought to establish an equitable title to tracts of public land against a multitude of different owners, the circuit court dispensed with the necessity of making all of them parties, and directed that their interest should be represented by a few on whom process was ordered to be served. The Supreme Court, though not expressing a definitive opinion, doubted if defendant’s separate and independent titles could authorize those absent to be thus represented. *Ayres v. Carver*, 17 How. 591. Where the mortgage of a railroad is made directly to the persons holding the bonds, who are named and their several interests described, all of them should be parties to a suit for its foreclosure. *Nashville &c. R. Co. v. Orr*, 18 Wall. 471.



**§ 65. Suits by members of voluntary associations.—**Where property was given in trust for a church not incorporated, it was held competent for any person belonging to that church, on behalf of himself and of all other members entitled to the use of the funds, to come into a court of equity to enforce the execution of the trust.<sup>1</sup> The officers of a voluntary association whose members are numerous may sue or be sued as representatives of the association.<sup>2</sup> Commissioners appointed by the Methodist Episcopal Church South filed a bill in chancery against the trustees of the Book Concern, a property belonging to the general church, accumulated by all its ministers, for a division of the same, and the rule permitting a portion of the parties to represent the whole body where the latter are numerous was applied.<sup>3</sup>

**§ 66. Effect of the decree on absent parties.—**In his celebrated work on Chancery Practice, Mr. Daniell, after stating that it has long been the established practice of the court to allow a plaintiff to sue on behalf of himself and of all the others of a numerous class of which he is one, and to make one of a numerous class the only defendant as representing the others, says that in these cases "the absent parties are generally bound" by the decree.<sup>4</sup> In the only case cited by

<sup>1</sup> Associate Ref. Church v. Trustees &c., 4 N. J. Eq. 77.

<sup>2</sup> McFadden v. Murphy, 149 Mass. 341; Van Houten v. Pine, 86 N. J. Eq. 133; Birmingham v. Gallagher, 112 Mass. 190; Beatty v. Kurtz, 2 Pet. 566. See, also, Liggett v. Ladd, 17 Oregon, 89.

<sup>3</sup> Smith v. Swormstedt, 16 How. 288. In that case fifteen hundred persons were represented by the complainants and double that number by the defendants. Judge Story's statement that where the court, in a proper case, permits a portion of the parties in interest to represent the entire body, the decree binds all of them, the same as if all were before the court, was also quoted with approval. An action was brought by

owners of eighty-five of the one hundred and fifty bonds secured by a mortgage for the removal of the trustee under the mortgage, not only for the benefit of themselves, but of the others who might become parties. It was held that it was within the provision of Code Civil Procedure of New York, section 448, that where the question is one of common or general interest of many persons, or the persons who might be made parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Gibson v. American L. & T. Co., 12 N. Y. Supl. 444.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 191.



him <sup>1</sup> three persons constituting a part of the board of directors of a mutual assurance company filed a bill on behalf of themselves and all other stockholders, praying that a policy signed by them might be delivered up to be canceled on the ground of fraud and misrepresentation.<sup>2</sup> It was objected that if the bill were dismissed with costs at the hearing the other members might file a second bill for the same object. To this the Master of the Rolls said:—"It cannot be denied that in cases of this description some anomalies do arise and some difficulties do inevitably occur which prevent the court from adhering strictly to its general principles; but if this objection be allowed to prevail there would be an end to the advantage which is afforded by this proceeding and to the rule that when parties are very numerous some of them are allowed to proceed in the name of all. How the court would proceed in such a case as that suggested has never, I think, been decided. I think there is a difficulty in the case, but it is one which the court could deal with. My impression is that in cases where a company have authorized others to enter into obligations for them and have thus placed them in a situation of responsibility to third parties, and those persons have come to this court and sought relief in the name and for the benefit of all, but their suit has been dismissed,—my impression is that this court would not allow other members to prosecute another suit for the same object."<sup>3</sup> Judge Story says that "if in a bill of this sort an account is taken, and there is a decree giving a certain portion of a fund before the court, the parties not before the court will be bound by that account and decree,<sup>4</sup> and the court will protect the defendant acting under the decree and obeying it from future litigation on the points so decided; for otherwise the defendant would really be deprived of all protection."<sup>5</sup>

<sup>1</sup> *Barker v. Walters*, 8 Beav. 92.

<sup>2</sup> The bill recited that the members of the company were so numerous that it was impossible to make them parties to the suit.

<sup>3</sup> *Barker v. Walters*, 8 Beav. 92.

<sup>4</sup> Cf. the language of the court in *Vann v. Hargett*, 2 Dev. & B. (N. C.) Eq. 81, quoted in § 62, note 8, *supra*.

<sup>5</sup> Story's Equity Pleading (10th ed.),

§ 94, citing Mitf. Eq. Pl. by Jeremy, 167-171; *Farrell v. Smith*, 2 Ball & B. 887, 841, 842; *Kenyon v. Worthington*, 2 Dick. 668; *Hallett v. Hallett*, 2 Paige, 18-20. In Story's Equity Pleading (10th ed.), § 106, the author says:—"But although the court will, in cases of this sort, entertain jurisdiction by creditors, legatees and distributees on behalf of themselves and all others,

**§ 67. Joinder of complainants in cases of fraud.**—Persons who have been induced by the same fraudulent representations, contained in a prospectus, to subscribe to the stock of a corporation, have a common interest, and may join in a bill for the benefit of themselves and others similarly deceived to set aside their subscriptions.<sup>1</sup> So where persons were induced to subscribe to the stock of a corporation by representations that it had a paid-up capital of a certain amount, was out of debt, and doing a profitable business, and that they would be given employment therein at specified wages, all of which representations were false, it was held that they could maintain a joint bill for the cancellation of their subscriptions and for a return of the money paid for the stock; it appearing that

and will exempt the executor or administrator, or other trustee, from all liability in respect to payments of the assets made pursuant to its decree, yet it is not to be understood that such a decree absolutely binds the absent creditors, legatees or distributees who have had no opportunity of proving and presenting their claims so that they are entitled to no redress, but are deemed to be concluded. On the contrary, although they have no remedy against the executor or administrator or trustee, yet they have a right to assert their claim to a share in the property against the creditors, legatees or distributees who have received it." See, also, *Farrell v. Smith*, 2 Ball & B. 341; *David v. Frowd*, 1 Myl. & K. 200; *Gillespie v. Alexander*, 3 Russ. 180. But the court is always watchful to protect the rights of absent persons whose interests are even incidentally brought to its notice before it finally disposes of the case. *Good v. Blewitt*, 13 Ves. 397; s. c., 19 Ves. 338; *Story's Equity Pleading* (10th ed.), § 96; *Angell v. Haddon*, 1 Mad. 529; *Dunch v. Kent*, 1 Vern. 200.

<sup>1</sup> *Bosher v. Richmond & H. L. Co.* (Va., 1892), 16 S. E. Rep. 360. The

court said:—"Where the fraudulent acts complained of are different and unconnected the joinder is not allowed, because they are different and separate, although similar, as where agents procure subscriptions by fraudulent representations at different times and under varying circumstances, although similar in their general scope, because the defense is different, each dependent upon its own circumstances. But in a case like the one made by this bill, where parties allege in the bill that the fraudulent acts are exactly the same and perpetrated by the same means and the injury identical as to all except only in the amount of the injury, as where the same false statements are distributed to all and the same false and deceitful prospectus is operated upon all alike and all have been defrauded by the same means and the relief sought is the same and the subject-matter identically the same, there is a community of interest and right, and such persons may unite as co-plaintiffs against the common wrong-doer." Cf. *Chester v. Halliard*, 36 N. J. Eq. 313, cited in the following section.

they acted jointly in the whole transaction, the representations were made to them jointly, or to one of them acting for all, and the money paid for the stock was drawn out of a former copartnership between them.<sup>1</sup> A bill by independent mill-owners, who derive water from the same dam, to restrain the operation of a dam above which obstructs their right of flowage, is not multifarious as to parties.<sup>2</sup>

§ 68. The same subject continued.—It was held in New Jersey that several depositors in a savings bank could not join in a bill against the directors on the ground that they were severally induced to put their money in the institution, the same proving to be insolvent.<sup>3</sup> Persons who were sepa-

<sup>1</sup> *Sherman v. American Stove Co.* (Mich.), 48 N. W. Rep. 587. The case was such that the court was enabled to say:—"There is not a single thing in the whole transaction applying to or affecting one which does not also apply to and affect the other. The case of one is the case of all and the relief asked is common and identical."

<sup>2</sup> *Cornwell Manuf'g Co. v. Swift* (Mich.), 50 N. W. Rep. 1001. In *Ingersoll v. Kirby*, Walk. Ch. 65, 70, Chancellor Manning says:—"A complainant cannot demand several distinct things having no connection with each other of several defendants by the same bill. But when the matter in litigation is entire in itself and does not consist of separate things having no connection with one another, it is not necessary that each defendant should have an interest in the suit co-extensive with the claim set up by bill. He may have an interest in a part of the litigation instead of the whole." Where the object of an action is to determine the respective rights of parties to water in a stream, and facts are shown which entitle the plaintiff to have this determined, all parties interested in the waters of the stream

are proper parties. *Patten Paper Co. v. Kaukauna Water-power Co.* (Wis.), 85 N. W. Rep. 787. See, also, *Springer v. Lawrence* (N. J.), 21 Atl. Rep. 41.

<sup>3</sup> *Chester v. Halliard*, 36 N. J. Eq. 818. The end sought was to compel the defendants to make good the loss which they alleged they had sustained. Beasley, C. J., said:—"The injurious act of the defendants was joint, but it operated on each of the complainants as an individual alone and out of all connection with his fellows. Each depositor was separately deceived. As actors in the suit each would be obliged to prove a distinct wrong done to himself, and some by the proofs might sustain their case while at the same time others might fail to do so. As these parties, therefore, have no common interest, they cannot according to rudimentary principles be joined as parties to the proceeding;" citing as directly in point, *Jones v. Garcia del Rio*, 1 Turn. & Russ. 297, where it was held that some of the holders of scrip or shares could not file a bill on behalf of themselves and the others to have their subscriptions returned. In *Hudson v. Maddison*, 12 Sim. 416, a suit by several occupants of houses to restrain the erection of a steam-

rately indicted for the sale of intoxicating liquors in original packages and separately enjoined from making such sales were not permitted to maintain a joint suit for an injunction against such proceedings, although they were respectively the agent and sub-agent of the same importor.<sup>1</sup>

§ 69. Suits affecting rights of residuary legatees.—In suits affecting the rights of residuary legatees or of next of kin, the general rule is that all the members of the class must be made parties.<sup>2</sup> But where they are numerous, and only some of them together with the executor and trustee under the will are made parties, the court upon being satisfied that it has a sufficient number before it to secure a fair trial of the question at issue may hear the case.<sup>3</sup>

engine which would be a nuisance to each of them, it was held that each occupier had a distinct right of suit and consequently could not sue jointly. This was placed on the ground "that as each of them has a separate nuisance to complain of, that which is an answer to one may not be an answer to the other, and if upon such a bill a decree were to be pronounced, it must be a decree which would provide for five different cases." The foregoing English cases were also cited by the court in sustaining a demurrer to a bill filed by the owners of several and distinct lots of land to enjoin a nuisance common to all the owners, but each complainant seeking relief for special injury to his own property. *Hinchman v. Paterson H. R. Co.*, 17 N. J. Eq. 76. The same point was affirmed in *Demarest v. Hardham*, 84 N. J. Eq. 469, where, however, it was said that several persons might join in a suit to restrain a nuisance common to all and affecting each in the same way, as, for example, an offensive slaughter-house in a populous part of a town. See, also, *Gray v. Rothschild*, 16 N. Y. St. Rep. 221; s. c., 113 N. Y. 668. In an action against

a tax collector for an account, where the defendant had held office for six years, and given six successive bonds with different sureties, it was decided that the sureties could not be joined as defendants in the suit. *State v. Turner* (Ark.), 5 S. W. Rep. 802.

<sup>1</sup> *Woolstein v. Welch*, 42 Fed. Rep. 566.

<sup>2</sup> *McArthur v. Scott*, 118 U. S. 840, 895, citing *Davou v. Fanning*, 4 Johns. Ch. 199; *Dehart v. Dehart*, 2 Green (N. J.), 471; *Hawkins v. Hawkins*, 1 Hare, 543, 545, and note; *Calvert on Parties*, 49, 287.

<sup>3</sup> *McArthur v. Scott*, 118 U. S. 840, 895, citing *Bradwin v. Harpur*, *Ambler*, 874; *Harvey v. Harvey*, 4 Beav. 215; s. c., 5 Beav. 184. "If any such residuary legatees or distributees are out of the jurisdiction of the court, and cannot conveniently be made parties, either as plaintiffs or defendants, the court will dispense with them, and proceed to decree the shares of the parties before it. Such a decree is of course not conclusive upon the absentees, or rather persons not made parties. But the general rule is dispensed with, because otherwise persons having clear rights would without their own default be

**§ 70. Parties in cases of trusts.**— The general rule is that in suits respecting trust property brought either by or against trustees the *cestuis que trust* as well as the trustees are neces-

precluded from asserting them, even when the rights of others would not necessarily be prejudiced thereby." Story's Equity Pleading (10th ed.), § 89. That there is some diversity of judicial opinion on the point whether one residuary legatee can maintain a bill for himself and all the other residuary legatees who are interested, see Story's Equity Pleading (10th ed.), § 89, n. Equity rule 48 of the United States Supreme Court provides that "When the parties on either side are very numerous, and cannot without manifest inconvenience and oppressive delays in the suit be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties." In *Harvey v. Harvey*, 4 Beav. 215, 220, 221, Lord Langdale said:—"The principal point which arose for decision in this case was whether a legacy given by the will of the testator after the death of the tenant for life to a class of persons not now ascertained, but who are to be ascertained upon the death of the tenant for life, was void for remoteness. Two objections for want of parties were taken by the defendants. The first was that it was not competent for the plaintiff to sue 'on behalf of herself and all others' who were in the like interest; for, as some questions might arise between them, the suit could not be sustained unless all the persons who had pre-

sumptive rights to a share of this legacy were before the court. Questions of this nature, whether certain persons so circumstanced are or are not indispensable parties to a suit, are very much questions of convenience; and in this case I am of opinion that, though some inconvenience may arise in not having all the parties presumptively entitled before the court, yet that such inconvenience would be considerably less than would necessarily arise from requiring them to be made parties in this stage of the cause; and which would probably amount to a complete obstruction of the suit, and would render it impossible even to bring it to a hearing. My opinion is that the first objection must therefore fail. The other objection for want of parties is this: it being a question whether the legacy is void for remoteness, it may happen that the next of kin have an interest in the legacy. That the next of kin will be convenient or proper parties provided they can be had here without inconvenience to the other side is a matter of no doubt. The plaintiff herself has considered that they would be proper parties, because she has made one of the next of kin, and another person who is both heir-at-law of the testator, and legal personal representative of another next of kin, defendants; and the widow who would be entitled to a share of the legacy in case of intestacy is also a defendant. The plaintiff alleges that there are now sufficient persons here to argue the question, or to maintain the interest of the next of kin. This, again, is a state of things in which the court may consider a

sary parties.<sup>1</sup> But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee

suit properly constituted on the ground of convenience; and looking with that view at the allegations contained in the bill and the answer, it does not now appear known that there will be a preponderating inconvenience by bringing the next of kin before the court. I am therefore of opinion that the cause cannot proceed without some further inquiry respecting the next of kin; and upon this occasion I must order an inquiry who are the next of kin, and who are the legal personal representatives of such of the next of kin as are dead. I make no other order, because in the end it may turn out, when we know who are the next of kin, that it would be necessary, or at least proper, for the plaintiff to proceed, even in the absence of the other next of kin. The question which I determine in the present stage of the case is this: that there is nothing upon which I can act to show that there would be a preponderating inconvenience in bringing before the court the next of kin or their representatives. There must be an inquiry before any further steps can be had."

<sup>1</sup> Carey v. Brown, 92 U. S. 171; Vetterlein v. Barnes, 124 U. S. 169; Story's Equity Pleading (10th ed.), § 207; Bregaw v. Claw, 4 Johns. Ch. 116; Fish v. Howland, 1 Paige, 20; Goddard v. Prentice, 17 Conn. 555; Brokaw v. Brokaw, 41 N. J. Eq. 216; Tyson v. Applegate, 40 N. J. Eq. 805, 811; Nichols v. Williams, 22 N. J. Eq. 63; Dunn v. Seymour, 11 N. J. Eq. 220. In Van Vechten v. Terry 2 Johns. Ch. 197, it was held on the foreclosure of a mortgage made by a

man as trustee for two hundred and fifty persons that the trustee alone was sufficient to be made defendant. It was placed on the ground of the great expense it would call for and the conviction that the trustee would for the purposes of that suit sufficiently represent all the parties in interest. But the same chancellor, in Malin v. Malin, 2 Johns. Ch. 288, states the rule to be that a mere nominal trustee cannot bring a suit in his own name without joining the *cestuis que trust* with him. See, also, Stillwell v. M'Neely, 2 N. J. Eq. 805, 807. In regard to the rule as to parties in cases of trust the court said the subject does not seem capable of exact definition. "Courts of equity exercise a large discretion in the matter, guided sometimes by slight circumstances, and taking care, on the one hand, that justice shall not be defeated through the impracticability of bringing in all persons interested in the issue, and, on the other hand, that the rights of individuals shall not be determined when they are neither heard nor represented." Smith v. Gaines, 39 N. J. Eq. 545, 550, holding that where a bill filed by trustees seeks the sale of real estate vested in them in trust, and they have not a present absolute power of disposition over their estate according to the terms of the trust, their *cestuis que trust* are necessary parties to the suit. In a suit to set aside a conveyance to a trustee to hold in trust for one person for her life, and at her death to such of her children as she may appoint, such children as the *cestui que trust* may have are not necessary parties;



who is the holder of the legal estate in the property without joining the *cestui que trust*.<sup>1</sup> It is otherwise if the complainant is endeavoring to enforce a claim adverse to the interests of the *cestui que trust*, but which is founded upon the supposed validity of the trust deed.<sup>2</sup> Where a suit is brought by a trustee for the recovery of trust property, or to reduce it to possession, and it in no wise affects his relations with his *cestui que trust*, the latter need not be made a party.<sup>3</sup> “*Cestuis que*

their interest is too uncertain and contingent. *Booraem v. Wells*, 19 N. J. Eq. 87.

<sup>1</sup> *Vetterlein v. Barnes*, 124 U. S. 169; *Wakeman v. Grover*, 4 Paige, 88; *Irwin v. Keen*, 3 Whart. 844, 855; *Therasson v. Hickok*, 87 Vt. 464; *Hunt v. Welmer*, 89 Ark. 70; *Winslow v. Minn. & C. R. Co.*, 4 Minn. 816; *Tucker v. Zimmerman*, 61 Ga. 601. See, also, *McArthur v. Scott*, 118 U. S. 840.

<sup>2</sup> *Rogers v. Rogers*, 8 Paige, 879. See, also, *O'Hara v. McConnell*, 98 U. S. 150; *Ex'rs of Reed v. Reed*, 16 N. J. Eq. 248.

<sup>3</sup> *Smith v. City of Portland*, 80 Fed. Rep. 784; *Carey v. Brown*, 92 U. S. 171. See, also, *Ashton v. Atlantic Bank*, 8 Allen, 217. “If a trustee acts in good faith, whatever binds him in any legal proceedings he begins and carries on to enforce the trust, to which the *cestuis que trust* are not actual parties, binds them. Whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. This is the undoubted rule. *Kerrison v. Stewart*, 98 U. S. 155, 160; *Corcoran v. Chesapeake & Ohio Canal Co.*, 44 U. S. 741, 745; *Shaw v. Little Rock & C. R. Co.*, 100 U. S. 605, 611.” *Richter v. Jerome*, 128 U. S. 233. In *Kerrison v. Stewart*, *supra*, Wait, C. J., said: — “It cannot be doubted that under some circumstances a trustee may represent his beneficiaries in all things relating to their common in-

terest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust (*Shaw v. Norfolk County R. Co.*, 5 Gray, 171; *Bisfield v. Taylor*, 1 Beat. 91; *Campbell v. Railroad Co.*, 1 Woods, 376; *Ashton v. Atlantic Bank*, 8 Allen, 220), or to one by a stranger against him to defeat it in whole or in part. *Rogers v. Rogers*, 8 Paige, 879; *Wakefield v. Grover*, 4 Paige, 84; *Winslow v. Minnesota Railroad Co.*, 4 Minn., 818; *Campbell v. Watson*, 8 Ohio, 500. In such cases the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party.” The beneficiaries of a fund are not necessary parties plaintiff to a suit by the general owners of it against one wrongfully detaining it. *Soper v. Manning*, 147 Mass. 126. And where assignees or other trustees for the benefit of creditors sue for the protection of the fund or to collect moneys due to the



*trust* are not, it seems, according to the modern rule in England, necessary parties to suits against trustees to compel the specific performance of contracts, except where some question arises touching the power of the trustees to execute the contract or their authority to act under it. But where a bill involves the title of the *cestuis que trust* to the property in dispute, or where they are interested, not only in the fund or estate respecting which the question at issue has arisen, but also in that question itself, they are necessary parties.”<sup>1</sup>

§ 71. Parties to bills for specific performance.— Where the vendor files a bill for specific performance, the personal representative of the purchaser, if the latter be dead, is a necessary party.<sup>2</sup> The heirs or devisees are also necessary parties if it is sought to enforce a lien for the purchase-money.<sup>3</sup> Where the personal representatives of a deceased vendor file a bill for specific performance, the vendor’s heirs ought to be made parties, either as complainants or defendants.<sup>4</sup> Upon a bill filed by the vendee, he cannot make a person who claims title to the land adversely to the vendor a party to the suit for the purpose of contesting the validity of his title.<sup>5</sup> The devisees are the proper persons to file a bill to enforce an agreement to convey to the testator lands subsequently devised to them.<sup>6</sup> On a bill filed by the heirs at law of a deceased vendee against the vendor, the personal representative of the decedent is usually deemed a necessary party; “for the heirs are entitled to have the contract primarily paid or discharged out of the personal assets.”<sup>7</sup> It is erroneous to make a mere agent who is not charged with any fraudulent or inequitable act a party defendant. If he is made a party, the complainant will not be entitled to a decree for costs

fund from third persons, the *cestuis que trust* need not be made a party to the suit. *Christie v. Herrick* (1845), 1 Barb. Ch. 254.

<sup>1</sup> *Van Doren v. Robinson*, 16 N. J. Eq. 256.

<sup>2</sup> Because the personal assets are primarily liable for the debt. Story’s *Equity Pleading* (10th ed.), § 177.

<sup>3</sup> Story’s *Equity Pleading* (10th ed.), § 177.

<sup>4</sup> Story’s *Equity Pleading* (10th ed.), § 160.

<sup>5</sup> *Eagle Fire Ins. Co. v. Lent* (1837), 6 Paige, 635.

<sup>6</sup> *Buck v. Buck* (1844), 11 Paige, 170.

<sup>7</sup> Story’s *Equity Pleading* (10th ed.), § 177; *Gardner v. Kelso*, 80 Ala. 497. See, also, *Downing v. Risley*, 15 N. J. Eq. 98.

against him, although he suffers the bill to be taken as confessed for want of an answer.<sup>1</sup> On the other hand, where an agent contracts in his own name, he is a necessary party to a suit by his principal for a specific performance.<sup>2</sup> And it was held that an agent who made an express contract in his own name to purchase land, and to give a deed of trust thereon to secure the unpaid purchase-money, could alone compel specific performance of the contract, though the vendor knew that he was acting for an unnamed principal.<sup>3</sup>

§ 72. **Suits to set aside fraudulent conveyances.**— Separate judgment creditors may unite in one suit against their common debtor to set aside a fraudulent conveyance by him.<sup>4</sup> If an assignee for the benefit of creditors refuses or unreasonably neglects to take proceedings to set aside conveyances by the assignor in fraud of his creditors, a judgment creditor of the assignor may institute such proceedings in the court of chancery for the benefit of himself and other creditors as to whom such conveyances are void, making the assignee a party defendant.<sup>5</sup> The fraudulent grantor, as he has no further interest in the property, is not deemed a necessary party to a bill to set aside the conveyance,<sup>6</sup> especially where the bill is

<sup>1</sup> *Boyd v. Vanderkemp*, 1 Barb. Ch. 278.

<sup>2</sup> *Pennsylvania &c. R. Co. v. Ryerson*, 86 N. J. Eq. 112, 116.

<sup>3</sup> *Kelley v. Thuey*, 102 Mo. 523; s. c., 15 S. W. Rep. 62. In a suit to compel A. to transfer stock, on a contract to transfer it if B.'s note were not paid at maturity, B. is a proper party with A. *Smedberg v. Whittlesey*, 8 Sandf. Ch. 320. In a suit by the vendee for specific performance of a contract to convey land, an infant, to whom part of the purchase-money notes were by direction of the vendor made payable, is a proper party. *Gentry v. Gentry*, 87 Va. 478; s. c., 12 S. E. Rep. 966. In a suit brought by heirs of a vendor to compel specific performance of a contract to exchange land, it was held that all the co-heirs ought to be made par-

ties, and that the death of one of them should be proved in order to excuse his omission as a party to the bill. *Morgan's Heirs v. Morgan*, 2 Wheat. 290.

<sup>4</sup> *Bomar v. Means* (S. C.), 16 S. E. Rep. 537; *Blackett v. Laimbeer*, 1 Sandf. Ch. 366. And several grantees who took by distinct conveyances, and against whom no joint fraud is charged, may be joined as defendants. *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Fellows v. Fellows*, 4 Cowen, 682; s. c., 15 Am. Dec. 412. See, also, *Smith v. Summerfield* (N. C.), 12 S. E. Rep. 997; *Williams v. Michenor*, 11 N. J. Eq. 521.

<sup>5</sup> *Lee v. Cole* (1888), 44 N. J. Eq. 318. See *Glenny v. Langdon*, 98 U. S. 20.

<sup>6</sup> *Dunn v. Wolf*, 81 Iowa 688; s. c., 47 N. W. Rep. 887; *Taylor v. Webb*,

filed by his assignee in bankruptcy.<sup>1</sup> For the same reason the administrator of the debtor is not a necessary party;<sup>2</sup> nor a person through whom the fraudulent conveyance passed, and who acted merely to promote the scheme for defrauding creditors.<sup>3</sup> A mortgagee of the grantor, whose rights under the mortgage are not brought into question, is not a necessary party;<sup>4</sup> but a mortgagee of the fraudulent grantee is a proper party;<sup>5</sup> and the assignee of the grantee who is the owner of the property at the time the bill is filed must be made a party.<sup>6</sup> A wife is a proper party to a bill filed to set

54 Miss. 86. See, also, *Creed v. Railway Co.*, 22 Wis. 260; *Smith v. Grim*, 26 Pa. St. 95; *Merry v. Freemon*, 44 Mo. 518; *Dockray v. Mason*, 48 Me. 178; *Laughton v. Harden*, 68 Me. 208. *Contra*, *Gaylords v. Kelshaw*, 1 Wall. 81.

<sup>1</sup> *Buffington v. Harvey*, 95 U. S. 99; *Weise v. Wardle*, L. R. 19 Eq. 171.

<sup>2</sup> *Coffey v. Norwood*, 81 Ala. 512. See, also, the cases cited in the preceding note. Where complainant seeks to subject to the payment of his judgment land the legal title to which was in a third person at the time of intestate's death, and which the administrator fraudulently caused to be conveyed to defendant, such third person and the administrator are necessary parties. *Huneke v. Dold* (N. Mex.), 82 Pac. Rep. 45. In *Hunt v. Van Derveer*, 48 N. J. Eq. 414, the creditor of a deceased debtor who had conveyed all her lands to one of her daughters in her life-time filed a bill to set aside such conveyances as fraudulent, and alleged that the decedent left no will and that no letters of administration had been taken out on her estate. It was held that all of her children were proper parties, as next of kin, on account of their interest in decedent's personal estate, and therefore a prayer that one of such children (not the grantee) discover whether she has any of her

mother's estate was good on demurrer for misjoinder.

<sup>3</sup> *Bomar v. Means* (S. C.), 16 S. E. Rep. 537. For instance, a third person through whom land was conveyed to a wife by her husband. *Sides v. Schaiff* (Ala.), 9 So. Rep. 228. But all persons participating in the fraud are proper parties. *Miller v. Jamison*, 24 N. J. Eq. 41; *Watts v. Wilcox*, 18 N. Y. Supl. 492. Thus it was held that the attorney of a creditor to whom a fraudulent mortgage was made, the attorney participating in the fraud, was properly joined as a defendant. *Sweet v. Clay* (Mich.), 49 N. W. Rep. 899.

<sup>4</sup> *Venable v. United States*, 2 Pet. 107.

<sup>5</sup> *Miller v. Jamison*, 24 N. J. Eq. 41; *Whittemore v. Cowell*, 7 Allen, 446. A person holding an insurance policy as security for a firm assigned it to a trustee for his wife and children. The firm became bankrupt, and in an action by the assignee in bankruptcy against the trustees and the insurance company to defeat the assignment it was held that the wife and children of the assignor were not necessary parties. *Vetterlein v. Barnes*, 124 U. S. 169.

<sup>6</sup> *Winchester v. Crandall*, Clarke's Ch. 371. In a suit to have a conveyance from one defendant to another set aside as fraudulent, one who has

aside conveyances of the husband's property made to her, or in which she has joined, and which are charged to have been voluntary, and fraudulent as against creditors of the husband.<sup>1</sup> A surety of the debtor is not a necessary party.<sup>2</sup>

**§ 73. Parties in bills for foreclosure.**— It is a general rule that all who have an interest in the mortgage and may be affected by the decree are proper parties complainant in a bill to foreclose.<sup>3</sup> “No principle of equity pleading is better settled than that there can be no foreclosure unless all the persons entitled to the mortgage money are before the court.”<sup>4</sup> But

purchased the land at sheriff's sale under an execution against both defendants is not a necessary party. *Kratz v. Buck*, 111 Ill. 40. Where the sole design of the bill is to have the individual property of one partner, alleged to have been fraudulently conveyed away by him, applied in satisfaction of a judgment against the firm, another partner from whom no discovery is sought, and against whom no relief is prayed, is neither a necessary nor a proper party. *Randolph v. Daly*, 16 N. J. Eq. 813.

<sup>1</sup> *Randolph v. Daly* (1868), 16 N. J. Eq. 813.

<sup>2</sup> *Cooper v. Cooper*, 5 N. J. Eq. 498. On a bill filed by a creditor to set aside as fraudulent a mortgage given to indemnify the mortgagee against his liability as indorser on certain promissory notes, it was held that the holders of the notes were necessary parties. *Dunham v. Ramsey*, 87 N. J. Eq. 888. Where a creditor seeks to reach property fraudulently conveyed by his debtor, which through several mesne conveyances by parties with notice has reached an innocent vendee, who has paid part of the purchase-money, the immediate grantor to such vendee should be made a party to the suit. Otherwise a decree would not prevent him from maintaining an action

for the remainder of the purchase-money. *Winans v. Graves*, 48 N. J. Eq. 268. Suit was brought by creditors of the C. Co. to subject real estate fraudulently conveyed to S., and by S. conveyed with warranty to the M. Co., to the payment of plaintiffs' claims. There was no prayer that these conveyances be set aside, the object of the bill being merely to have them declared void as to plaintiffs. It was held that S. was not a necessary party to the suit. *Pullman v. Stebbins*, 51 Fed. Rep. 10. A bill to set aside conveyances as in fraud of creditors, which joins several fraudulent grantees, who claim different portions of the debtor's property, is not subject to the objection that it is multifarious. *Collins v. Stix* (Ala.), 11 So. Rep. 880.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), §§ 199, 201.

<sup>4</sup> *Large v. Van Doren*, 14 N. J. Eq. 208, 212; *Trades Savings Bank v. Freese*, 26 N. J. Eq. 458; *Beebe v. Morris*, 56 Ala. 525; *Bibb v. Hawley*, 50 Ala. 408; *Palmer v. Carlisle*, 1 Sim. & Stu. 423. Where a mortgage is given or assigned for the payment of a debt due to two or more jointly on a bill to foreclose filed by the surviving obligee, the executor of a deceased co-obligee need not necessarily be joined as a complainant,

it has been held that a trustee for bondholders may file a bill to foreclose the mortgage security in his own name for the benefit of the *cestuis que trust*, without making any of the bondholders parties.<sup>1</sup> Where the trustee under a railroad mortgage at the instance of a majority of the bondholders foreclosed the mortgage, it was held that a bondholder who had no actual notice of the proceedings would be regarded as a party to them so as to be bound by the decree.<sup>2</sup> A mortgagee who has assigned the mortgage as security for a less amount than the mortgage may, especially where the pledgee refuses to proceed, file a bill of foreclosure in his own name.<sup>3</sup> The heirs of a deceased mortgagee cannot sustain a bill of foreclosure, but it must be brought in the name of the executor or administrator.<sup>4</sup> Where some of the holders of bonds apply to the trustee to whom a deed of trust was given as security for the bonds to foreclose it, and he refuses to do so, they may bring suit for such purpose, making the trustee and other bondholders who refuse to join them in the suit defendants therein.<sup>5</sup> Where the trustees of a railroad mortgage or

though it would be in accordance with the practice of the court to do so. If there are conflicting claims between the parties in interest in the mortgage debt, the surviving obligee may make the executor of the deceased co-obligee a defendant, suggesting the reason therefor in the bill. But whether the executor shall be joined as co-complainant or co-defendant is a mere question of practice and cannot support an objection made at the final hearing. *Freeman v. Scofield*, 16 N. J. Eq. 28. In a suit to foreclose a railroad mortgage it appeared that the owners of the bonds, who, with the trustee, were complainants, held them as collateral security only for a debt less than the amount of the bonds. The assignor was deemed to be a necessary party. *Ackerson v. Long Branch & Co.* (1887), 28 N. J. Eq. 542.

<sup>1</sup> *Hackensack Water Co. v. De Kay* (1888), 36 N. J. Eq. 548, 552; *Richter*

*v. Jerome*, 128 U. S. 283. *Cf. Allen v. Roll*, 25 N. J. Eq. 163; *Tyson v. Applegate*, 40 N. J. Eq. 305; *Boyd v. Jones*, 44 Ark. 314; *Chicago & Land Co. v. Peck*, 112 Ill. 408; *Re Chickering*, 56 Vt. 82; *Carpenter v. Cincinnati & C. R. Co.*, 85 Ohio St. 807.

<sup>2</sup> *Gates v. Boston & C. R. Co.*, 58 Conn. 838.

<sup>3</sup> *Norton v. Warner*, 8 Edw. Ch. 106.

<sup>4</sup> *Roath v. Smith*, 5 Conn. 133.

<sup>5</sup> *Omaha Hotel Co. v. Wade* (1878), 97 U. S. 18. It was objected that non-resident holders who were omitted, either as complainants or defendants, were indispensable parties, but the court said: — "It is true, beyond doubt, that all persons materially interested in the fund to be distributed should be made parties to the litigation; but this rule, like all general rules, will yield whenever it becomes necessary that it should be modified in order to accomplish the

deed of trust are dead, a bill of foreclosure and sale may be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders secured by the same mortgage; or if there be several successive mortgages, the trustees of which are dead, and the complainants bondholders secured by each mortgage, the bill may be filed on behalf of themselves and all of the bondholders under each mortgage.<sup>1</sup> One of three trustees in a trust deed is entitled to sue alone for foreclosure when he avers that one of the others is dead, and that the remaining one, at a sale of the property under a decree of a State court, claimed to be interested in the purchase thereof, and "is interested adversely to your orator as trustee of said bondholders."<sup>2</sup> And where one of two testamentary trustees failed to qualify he was not a necessary party to a suit to foreclose a mortgage given by the testator.<sup>3</sup> The heirs of a deceased mortgagor are necessary parties to a suit to foreclose the mortgage, but the executor or administrator is not a necessary, though he is a proper, party.<sup>4</sup>

**§ 74. The same subject continued — Parties defendant.**— The owner of property mortgaged at the time suit is brought for the foreclosure of the mortgage or the sale of the mortgaged premises, whether he be the original mortgagor or his successor in interest,<sup>5</sup> is an indispensable party to the

ends of justice. Authorities everywhere agree that exceptions exist to the general rule; and this court decided that the general rule will yield if the court is able to proceed to a decree and do justice to the parties before the court, without injury to others not made parties who are equally interested in the litigation."

<sup>1</sup> *Galveston &c. R. Co. v. Cowdrey*, 11 Wall. 459.

<sup>2</sup> *Robinson v. Alabama & G. Manuf. Co.*, 48 Fed. Rep. 12.

<sup>3</sup> *Steinhardt v. Cunningham* (N. Y.), 29 N. E. Rep. 100.

<sup>4</sup> *Hill v. Townley* (Minn.), 47 N. W. Rep. 653.

<sup>5</sup> Excepting a mortgagor who has

made an absolute assignment of the equity of redemption. *Daugherty v. Deardorf*, 107 Ind. 527; *Ayres v. Wiswall*, 112 U. S. 187; *Miner v. Smith*, 58 Vt. 551. See, also, *Bigelow v. Bush*, 6 Paige, 843, holding, however, that he is a proper party, and *Vreeland v. Loubat*, 2 N. J. Eq. 104, and *Chester v. King*, 2 N. J. Eq. 405; *Tyler v. Brigham*, 143 Mass. 410, 412, to the same point; *Andrews v. Stelle*, 22 N. J. Eq. 478. Where a bill for foreclosure is brought against the mortgagor, and he becomes a bankrupt pending the suit, the assignee must be made a party, and a decree against the mortgagor alone will be a nullity as to the assignee. *Johnson*



suit.<sup>1</sup> An incumbrancer *pendente lite* need not be made a party,<sup>2</sup> and the prevailing rule does not make prior<sup>3</sup> or subse-

*v. Fitzhugh*, 8 Barb. Ch. 360. And on a bill for foreclosure by the assignee of a mortgage, the mortgagee need not be made a party where he has parted with all his interest by an absolute assignment. *Whitney v. M'Kinney*, 7 Johns. Ch. 144.

<sup>1</sup>*Terrell v. Allison*, 21 Wall. 289; *Story's Equity Pleading* (10th ed.), §§ 193, 195; *Steele v. Maunder*, 1 Coll. 585; *Giffard v. Hart*, 1 Sch. & Lef. 386. A person who was a member of a partnership when a mortgage was given to the firm (but in the name of one partner only), and also when advances were afterwards made thereon by the firm, and when the bill was filed, ought to be a party to a suit for its foreclosure. *De Greiff v. Wilson*, 30 N. J. Eq. 435. A mortgagor is not a necessary party to a bill for deficiency against several successive purchasers of the property who assumed payment of the mortgage. The court will order him to be made a party if necessary to their protection. *Pruden v. Williams*, 26 N. J. Eq. 210. Where several successive purchasers of mortgaged property have each assumed payment of the mortgage, they are proper but not necessary parties in a suit to foreclose it. *Pruden v. Williams*, 26 N. J. Eq. 210. The heir of a deceased mortgagor is a necessary party (*Hill v. Townley*, 45 Minn. 167; *s. c.*, 47 N. W. Rep. 653; *Fell v. Brown*, 2 Bro. Ch. 276, 278; *Farmer v. Curtis*, 2 Sim. 466), but not the personal representative (*Stanley v. Mather*, 81 Fed. Rep. 860), unless the personal estate is to be affected by the proceedings. *Leonard v. Morris*, 9 Paige, 90; *Hodgdon v. Herdman*, 66 Iowa, 645; *Bradshaw v. Outram*, 18 Ves. 234. In Florida the

husband of a married woman is a necessary party to a suit in equity to foreclose a mortgage upon real estate owned by her there. *Anderson v. Watt*, 138 U. S. 694. In a suit to foreclose a mortgage which the wife of the mortgagor has signed for the purpose of releasing her dower, it is not necessary to join her as a defendant in order to defeat her inchoate right of dower in the equity of redemption. *Pitts v. Aldrich*, 11 Allen, 89. The statute (Gen. St. 1888, sec. 3010) which provides that "the foreclosure of a mortgage shall be a bar to any further action upon the mortgage debt, note or obligation, unless the party or persons who are liable for the payment thereof are made parties to such foreclosure," applies to mortgages of personal property as well as of real estate. *Ansonia Bank's Appeal*, 58 Conn. 257.

<sup>2</sup>*Cook v. Mancius*, 5 Johns. Ch. 89; *Garth v. Ward*, 2 Atk. 174; *Adams v. Paynter*, 1 Coll. 582; *Bishop of Winchester v. Paine*, 11 Ves. 194, 197.

<sup>3</sup>*Hagan v. Walker*, 14 How. 87; *Western Reserve Bank v. Potter*, *Clarke's Ch.* 432; *Case Mfg. Co. v. Smith*, 40 Fed. Rep. 339; *First Nat. Bank v. Salem Capital F. M. Co.*, 31 Fed. Rep. 580; *Woodworth v. Blair*, 112 U. S. 8; *Jerome v. McCarter*, 94 U. S. 734. "If, however, there is substantial doubt as to the amounts due such prior incumbrancers, or as to the property covered by their liens, or if the bill seeks to affect their interests by praying for a sale of the entire property, and not of the equity of redemption alone, they seem to be necessary parties." *Story's Equity Pleading* (10th ed.), § 193, note a, and cases cited. A mortgage made subject to a prior mortgage, or to a



quent incumbrancers<sup>1</sup> necessary parties defendant, the only consequence being that those who are omitted are not concluded by the decree.<sup>2</sup>

§ 75. The same subject continued — Adverse claimants. “It is well settled that in a foreclosure proceeding the complainant cannot make a person who claims adversely to both the mortgagor and mortgagee a party, and litigate and settle his rights in that case.”<sup>3</sup> Nevertheless it was held to be

lease, or to a life estate, or on land incumbered by ground rent, or by tax assessments, which takes precedence of all interests in the lands, may be foreclosed without making the prior mortgagee, lessee, life tenant, owner of ground rent, or the municipal corporation to whom taxes are due, parties, although in these cases such persons have a clear interest in the land which is the subject-matter of the suit. *Van Keuren v. McLaughlin*, 21 N. J. Eq. 153, 165.

<sup>1</sup> *Needles v. Deeble*, 1 Ch. Cas. 299; *Roscarrick v. Barton*, 1 Ch. Cas. 217; *Greswold v. Marsham*, 2 Ch. Cas. 170; *Cockes v. Sherman*, Freem. 14; s. c., 8 Ch. Rep. 83; *Lomax v. Hide*, 2 Vern. 185; *Draper v. Clarendon*, 2 Vern. 518; *Godfrey v. Chadwell*, 2 Vern. 601; *Morret v. Western*, 2 Vern. 668; *Brewster v. Wakefield*, 22 How. 118; *Smith v. Chapman*, 4 Conn. 344; *Howard v. Railway Co.*, 101 U. S. 837; *New Orleans C. & B. Co. v. Stafford*, 12 How. 348. On a bill to foreclose a first mortgage it was held in New Jersey that the holders of all incumbrances existing at the time of commencing the suit must be made parties. And where it appeared on the final hearing of a foreclosure suit that a mortgagee whose incumbrance was subsequent to that of the complainant was not a party, the suit was stayed to bring him in. *Gould v. Wheeler*, 28 N. J. Eq. 541.

<sup>2</sup> *Story's Equity Pleading* (10th ed.), § 193; *McCall v. Yard*, 11 N. J. Eq. 58. See, also, the cases cited in the two preceding notes; *Haines v. Beach*, 3 Johns. Ch. 459; *Ensworth v. Lambert*, 4 Johns. Ch. 605; *Carpenter v. Ingals* (So. Dak.), 51 N. W. Rep. 948, where it is said the only necessary party defendant is the owner of the equity of redemption. On a foreclosure suit no incumbrancers need be made parties whose interests have already been foreclosed. *Broome v. Beers*, 6 Conn. 198. A creditor of the mortgagor, who has attached his equity of redemption in a suit still pending, must be made a party to a bill of foreclosure. If this be not done, and he subsequently recover judgment after the decree for foreclosure has become absolute, he will be entitled, upon perfecting his levy of execution, to redeem. *Lyon v. Sanford*, 5 Conn. 544. Where a bill to foreclose a mortgage stated that the mortgage casually came into the hands of a non-resident, who unjustly and fraudulently retains it and has no interest in it, it was held that he should be made a party and no decree would be given for complainant until he was brought in. *Chamberlain v. Hoffman*, 88 N. J. Eq. 41.

<sup>3</sup> *Dial v. Reynolds*, 96 U. S. 340; *Wilkins v. Kirkbride*, 27 N. J. Eq. 98; *Croghan v. Minor*, 58 Cal. 15; *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635; *McComb v. Spangler*, 71 Cal. 423;

within the authority of the court, upon a bill to foreclose, to determine the validity or invalidity of a *prima facie* paramount tax title, and that the holder of it was a proper if not a necessary party to such a bill.<sup>1</sup>

§ 76. **Complainants in bills to redeem.**—All persons legally interested in the right to redeem a mortgage must be made parties to a bill to redeem,<sup>2</sup> and one having an apparent equitable interest in the premises liable to be affected by the decree for redemption ought to be made a party to the proceeding.<sup>3</sup> “If the mortgagor brings the bill against the mortgagee, there having been no death or assignment on either side, and no other circumstances to affect the case, no other persons but them need be made parties. If the mortgagor be dead, then his heir or his devisee, if the estate has been devised, is the proper party to redeem, if it be a mortgage in fee; and if it be a mortgage for a term of years only, then

*Farmers' Loan Co. v. San Diego Street-Car Co.*, 40 Fed. Rep. 105; *Corning v. Smith*, 6 N. Y. 82; *Lange v. Jones*, 5 Leigh, 192. Such a bill would be multifarious. *Dial v. Reynolds*, *supra*; *Banks v. Walker*, 2 Sandf. Ch. 344.

<sup>1</sup> *Hefner v. Northwestern Mut. L. Ins. Co.*, 128 U. S. 747, containing an exhaustive discussion of the conclusiveness of the adjudication.

<sup>2</sup> *Rowell v. Jewett*, 69 Me. 298; *Henley v. Stone*, 8 Beav. 855. In the last case the Master of the Rolls said:—“It is said that no harm can result from one of several persons interested in the equity of redemption being allowed to redeem in the absence of the others. I cannot say I am satisfied of that, but I am warranted in saying that a compulsory bill for redemption cannot be maintained in this court by a party having a partial interest in the equity of redemption, in the absence of the other parties interested therein; and no authority for such a proceeding has

been produced.” “If any of them refuse to become parties complainant they must be made respondents.” *Welch v. Stearnes*, 69 Me. 192, 193, citing *Chamberlain v. Lancey*, 60 Me. 280; *Southard v. Sutton*, 68 Me. 575. “There can be no foreclosure or redemption unless the parties entitled to the whole mortgage money are before the court.” *Palmer v. Carlisle*, 1 Sim. & Stu. 428, 425. “The fact that one of the parties having an interest in the equity of redemption resides out of the State is no excuse for omitting to make him a party to the bill to redeem.” *Southard v. Sutton*, *supra*.

<sup>3</sup> *Rowell v. Jewett*, 69 Me. 298, 304, where the court said “he should be made a party in order to accomplish what is said to be ‘the great object of courts of equity,’ the settlement in one suit of the conflicting claims of all parties concerned in the subject-matter, thus putting an end to litigation respecting it.”

the personal representative of the deceased. If two estates are mortgaged and by the death of the mortgagor the equity of redemption of the two estates is vested in different persons, all of them must be made parties to a bill to redeem."<sup>1</sup> Generally the right to redeem exists in every person who has acquired any interest in the lands, by operation of law or otherwise, in privity of title.<sup>2</sup> But a mortgagor who has conveyed his estate absolutely with covenants of warranty has no right of redemption by reason of the covenants.<sup>3</sup> A joint assignee of a mortgagee may, without joining the other assignee, maintain a bill to redeem a prior mortgage.<sup>4</sup>

§ 77. Defendants in bills to redeem.—The rule is elementary that all parties whose interests are to be affected or concluded by the decree should be made parties to a bill to redeem.<sup>5</sup> The heirs of a deceased mortgagee as well as his personal representatives are ordinarily necessary parties.<sup>6</sup> If the mortgagee has assigned his whole interest in the debt he may not be a necessary party;<sup>7</sup> but where he retains an interest in it he is a

<sup>1</sup> Story's Equity Pleading (10th ed.), § 182, citing *Cholmondeley v. Clinton*, 2 J. & W. 1; s. c., 2 Mer. 171; 4 Bligh, 1; *Dexter v. Arnold*, 2 Sumner, 108.

<sup>2</sup> *True v. Haley*, 24 Me. 297, 298.

<sup>3</sup> "He has no remaining interest in the land and no privity of title therein." *True v. Haley*, 24 Me. 297, 298.

<sup>4</sup> His redemption inures to the benefit of his co-tenant, and he can only redeem by paying all claims under the prior mortgage. *Platt v. Squire*, 12 Met. 494.

<sup>5</sup> *Hunt v. Rooney*, 77 Wis. 258, 262. Under a bill brought by a widow to redeem from a mortgage executed by her husband in which she joined to release dower, she may join as a co-defendant one who after the execution of the mortgage purchased her husband's interest in the land. *McCabe v. Bellows*, 1 Allen, 269. Where the mortgagee has quit-

claimed the land without assigning the mortgage debt he is a necessary party. *Beals v. Cobb*, 51 Me. 348. So the assignee of the mortgage debt has an equitable interest and should be a party to the suit. *Stone v. Locke*, 46 Me. 445.

<sup>6</sup> Story's Equity Pleading (10th ed.), § 188. "We do not know that where an heir is beyond the jurisdiction of the court the difficulty is absolutely insuperable. But if it is not, still the court is bound in its decree to take care of his interests, as far as it may, and to give him by notice an opportunity, if practicable, of coming in before the master and litigating for his interests in the taking of the account and the decree of redemption." Per Story, J., in *Dexter v. Arnold*, 1 Sumn. 109, 118.

<sup>7</sup> *Whitney v. M'Kinney*, 7 Johns. Ch. 144; *Wolcott v. Sullivan*, 1 Edw. Ch. 399.

necessary party as well as the assignee.<sup>1</sup> A surety on the mortgage note who, to the knowledge of the mortgagor before the latter filed his bill to redeem, had been compelled to pay the note and had thereby become the owner of the mortgage, was held to be a necessary party and entitled to come in and defend without terms.<sup>2</sup> But where the husband of an intermediate assignee of the mortgage, who, before the suit was commenced, had assigned all her interest in the mortgage absolutely, neither of them having received any rents or profits, was united as a defendant with the last assignee, it was declared to be a clear case of a misjoinder.<sup>3</sup> Where the legal title is held in trust the trustee and the *cestuis que trust* are all necessary parties.<sup>4</sup>

§ 78. Objection for want of necessary parties.— If the objection of want of necessary parties appears on the face of the bill the defendant may demur.<sup>5</sup> Such a demurrer must point out the necessary parties, either by name in reference to some statement of their names in the bill, or by their characters, as the heirs, devisees, personal representatives, assignees, creditors, etc., of some of the persons named or referred to in such bill.<sup>6</sup> Where the omission of necessary parties does not

<sup>1</sup> Story's Equity Pleading (10th ed.), § 191; *Hunt v. Rooney*, 77 Wis. 258, 262, holding that the mortgagee after assignment was a proper party, since it did not appear when he parted with his interest, nor what amount of rents, if any, he received while he held the mortgage debt. That the assignee is a necessary party, see *Dias v. Merle*, 4 Paige, 259.

<sup>2</sup> *Hunt v. Rooney*, 77 Wis. 257. "It seems a violation of the most obvious and familiar principles of law," said the court, "to state the account and discharge the debt in his absence from the record."

<sup>3</sup> *Lennon v. Porter*, 2 Gray, 473. See, also, *Chambers v. Goldwin*, 9 Vea. 268; *Beals v. Cobb*, 51 Me. 848.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 192, citing *Whistler v. Webb*, Bunb. 53; *Wetherell v. Collins*, 3 Mad. 255;

*Drew v. Harman*, 5 Price, 319. In a bill to redeem a mortgage a right of contribution from a subsequent mortgagee of a portion of the mortgaged premises cannot be settled unless such mortgagee is made a party to the bill. *George v. Wood*, 9 Allen, 80.

<sup>5</sup> *Mitchell v. Lenox*, 2 Paige, 280; *Carey v. Brown*, 92 U. S. 171; *Wilson v. Bellows*, 30 N. J. Eq. 282. A general demurrer will not lie where the demurrant is a proper party, though no relief can be had against him. *Dorsheimer v. Rorback*, 23 N. J. Eq. 46.

<sup>6</sup> *Dias v. Bouchand* (1848), 10 Paige, 445; *Hughes v. Hughes*, 72 Ga. 173; *Oliva v. Bunaforza*, 31 N. J. Eq. 395, 398. Under a general demurrer for want of equity, a demurrer *ore tenus* may be made for want of parties. *Stillwell v. M'Neely*, 2 N. J. Eq. 305.

appear on the face of the bill, the proper mode of taking advantage of it is by plea or answer.<sup>1</sup> If the omitted parties are merely formal, the court will be indisposed to listen to the objection at the hearing, and if it can properly do so will dispose of the case upon its merits without requiring such formal parties to be joined.<sup>2</sup> But if a suitable decree cannot be entered for want of an indispensable party, the court may at the hearing take notice of the fact, and direct the cause to stand over that such new parties may be added,<sup>3</sup> or dismiss the bill without prejudice;<sup>4</sup> or the appellate court may, in its

<sup>1</sup> *Story v. Livingston*, 18 Pet. 360; *Mitchell v. Lenox*, 2 Paige, 280. Setting forth the facts by which other persons named therein are made necessary or proper parties. *Schwoerer v. Boylston Market Ass'n*, 99 Mass. 285, 295; *Robinson v. Smith*, 3 Paige, 222. Exception to the omission of a necessary party may be taken in an answer, praying the same advantage as if the defendant had demurred. *Tunnard v. Littell*, 28 N. J. Eq. 264, 269. A plea for want of parties defendant ought not to be allowed where it appears upon the bill that the parties not joined as defendants are beyond the jurisdiction. The objection should be taken by demurrer specially pointing out the defect. *Palmer v. Stevens*, 100 Mass. 461. See, also, *Milligan v. Milledge*, 8 Cranch, 220.

<sup>2</sup> *Kean v. Johnson* (1853), 9 N. J. Eq. 402. Objections for misjoinder or non-joinder are ordinarily too late at the hearing. *Keller v. Ashford*, 133 U. S. 610; *Hyde v. Tracy*, 2 Day, 492; *Trustees &c. v. Cowen*, 4 Paige, 510; *Townsend v. Augur*, 3 Conn. 354; *Ferguson v. Fisk*, 28 Conn. 501; *Nash v. Smith*, 6 Conn. 421; *Chambers v. Robbins*, 28 Conn. 552; *Bunnell v. Read*, 21 Conn. 586; *Dias v. Bouchand*, 10 Paige, 446; *Chipman v. Hartford*, 21 Conn. 489; *Cromer v. Pinckney*, 3 Barb. Ch. 466, 474; *Jew-*

*ett v. Tucker*, 139 Mass. 566; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Barth v. Deuel*, 11 Colo. 494; & c., 19 Pac. Rep. 471; *Cutler v. Tuttle*, 19 N. J. Eq. 549; *Trustees v. Williamson*, 36 N. J. Eq. 141, 145; *Annin v. Annin*, 24 N. J. Eq. 184; *Hendrickson v. Wallace*, 31 N. J. Eq. 604, 606; *Swallow v. Swallow*, 27 N. J. Eq. 279. The effect of an absence of necessary parties when the objection is raised for the first time at the final hearing rests very much in the discretion of the court, to be exercised in view of the effect of the decree upon the rights of the omitted parties and of the value of the decree to the complainant. *Winans v. Graves*, 43 N. J. Eq. 268, 277; *Wood v. Stover*, 28 N. J. Eq. 248.

<sup>3</sup> *Schwoerer v. Boylston Market Ass'n*, 99 Mass. 285, 295; *Harris v. Trustees &c.*, 110 Mass. 209; *Price v. Minot*, 107 Mass. 49; *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163; *Sears v. Hardy*, 120 Mass. 524. Such is the practice in Connecticut. *New London Bank v. Lee*, 11 Conn. 112; *Campbell v. Campbell*, 8 N. J. Eq. 738, 742; *Taylor v. Mills*, 2 Edw. Ch. 318; *O'Brien v. Heeney*, 3 Edw. Ch. 342; *Taylor v. Mills*, 2 Edw. Ch. 318, 328, where neither party had costs of the hearing; *Perham v. Haverhill Fiber Co.*, 64 N. H. 2.

<sup>4</sup> *Northampton Nat. Bank v. Crafts*.

discretion, if it cannot make a decree which will finally and properly dispose of the subject-matter of the controversy in the absence of a party, remit the cause for the purpose of bringing him in.<sup>1</sup>

§ 79. **Objection for misjoinder of complainants.**—It is a good ground of demurrer to the whole bill that a person who has no interest in the controversy, and has no equity as against the defendant, is improperly joined as a party complainant.<sup>2</sup> But the objection should be taken by demurrer, or in the answer of the defendant, where the objection appears on the face of the bill. It comes too late at the hearing,<sup>3</sup> or on a

145 Mass. 444, 447; *Schwoerer v. Boylston Market Ass'n*, 99 Mass. 285, 298; *Miller v. McCan*, 7 Paige, 451; *Van Epps v. Van Deusen*, 4 Paige, 64. Especially upon complainant's failure to amend. *Mallow v. Hinde*, 12 Wheat. 193, 199; and see Equity Rule 52 of the United States Supreme Court, in the appendix to this work. If, on the hearing, it appears by the record that all the necessary defendants have not been made parties, and if the bill were amended and they were made parties that the bill would necessarily be multifarious, it should be dismissed without prejudice. *Shaffer v. Fetty*, 80 West Va. 248; s. c., 4 S. E. Rep. 278.

<sup>1</sup> *McLaughlin v. Van Keuren*, 21 N. J. Eq. 379; *Jewett v. Tucker*, 139 Mass. 563; *Lewis v. Darling*, 16 How. 1. But he must be an indispensable party. *Mechanics' Bank v. Seton*, 1 Pet. 299; *Berryman v. Graham*, 21 N. J. Eq. 370; *Gibbs v. Diekma*, 102 U. S. 216; *Carey v. Brown*, 92 U. S. 171; *Wetherbee v. Baker*, 35 N. J. Eq. 501, 509; *Livingston v. Woodworth*, 15 How. 546; *Morgan v. Blatchley*, 83 West Va. 155; *O'Fallon v. Clopton*, 89 Mo. 284. New parties to a suit cannot be admitted in an appellate court having no original jurisdiction. The only course for the court to take if

necessary parties are not before it is to reverse the decree and dismiss the bill or remit the cause to the court below to the end that proper parties may be added. *New Jersey Franklinite Co. v. Ames*, 12 N. J. Eq. 507, 509.

<sup>2</sup> *Clarkson v. De Peyster* (1832), 3 Paige, 836; *House v. Muller*, 22 Wall. 42. All the defendants may demur. *Cuff v. Platell*, 4 Russ. 242; *King of Spain v. Machado*, 4 Russ. 225; *Bill v. Cureton*, 2 Myl. & K. 508, 512. "It is well settled to be a sufficient ground for dismissing a bill, that a person is joined as a co-complainant who has no interest in the matters of the suit, and no right to sue; and the objection may be taken by demurrer or raised by plea, as the case may be." *Clason v. Lawrence*, 3 Edw. Ch. 48, 58.

<sup>3</sup> *Talmadge v. Pell*, 9 Paige, 410, 412; *Story v. Livingston*, 18 Pet. 360; *Harder v. Harder*, 2 Sandf. Ch. 17; *Murray v. Blunt*, 1 Barb. Ch. 59; *Turner v. Hart*, 71 Mich. 128; s. c., 38 N. W. Rep. 890; *Green v. Richards*, 23 N. J. Eq. 32; *Lyman v. Place*, 26 N. J. Eq. 80; *Voorhees v. Melick*, 25 N. J. Eq. 523; *Elmer v. Loper*, 25 N. J. Eq. 475, 480; *Bowen v. Idley*, 1 Edw. Ch. 148. As a general rule objection should be made by de-



rehearing.<sup>1</sup> The court will, however, dismiss a bill, on its own motion, for misjoinder of complainants when it appears that their separate interests are of such a nature that they are likely, in the future progress of the cause, to come into conflict, and thus transform the suit into a contest between the complainants.<sup>2</sup>

§ 80. **Objection for misjoinder of defendants.**—It is no ground of objection by one defendant that another defendant is not a proper party if the interests of the former are not thereby affected.<sup>3</sup> It is only where the complainant has some

murrer. *Hinchman v. Paterson H. R. Co.*, 17 N. J. Eq. 76. If defendant answers, the objection is waived. *Hendrickson v. Wallace*, 81 N. J. Eq. 604. Complainant joined without consent may have his name stricken out with costs on motion upon notice. *Keppell v. Bailey*, 2 Myl. & K. 517; *Titterton v. Osborne*, 1 Dickens, 850; *Wilson v. Wilson*, 1 J. & W. 459. A motion to dismiss as to him is not correct. *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110. Sometimes an amendment may be allowed making an improper complainant a defendant. *Aylwin v. Bray*, 2 Y. & Jer. 518, n. Act 15 and 16 Vict., chapter 86, section 49, provides for curing misjoinder by amendment, or modification of decree, etc., and that no suit shall be dismissed for that reason. An objection for want of an indispensable party plaintiff may be made for the first time at the hearing. *Malin v. Malin*, 2 Johns. Ch. 288, 289. Where the objection of want of necessary parties complainant is made at the hearing, the cause may be ordered to stand over until they are made parties. *Dunn v. Seymour*, 11 N. J. Eq. 220, where a trustee sued without joining his *cestuis que trust*. An objection that one holding an equitable title to a patent is not joined as complainant

with the holder of the legal title was overruled at the hearing. *California Electric Works v. Finck*, 47 Fed. Rep. 588.

<sup>1</sup> *Fowler v. Reynal*, 8 McN. & G. 500, 511; s. c., 15 Jur. 1019, 1021.

<sup>2</sup> *Hendrickson v. Wallace's Ex'rs*, 81 N. J. Eq. 604. A dismissal should be without prejudice. *House v. Mullen*, 22 Wall. 42. A bill for foreclosure was filed by A. in his capacity as president of a national bank, and every pleading in the case, including the answer and cross-bill and the captions thereto, and every order and decree, recognized the bank as complainant. It was held that the defendant could not, on appeal, even to defeat the jurisdiction, assert that A., instead of the bank, was the complainant. *Fortier v. New Orleans Nat. Bank* (1884), 112 U. S. 488. Under the Connecticut Practice Act of 1879, all persons having an interest in the subject of the suit, and in obtaining the judgment, may be joined as plaintiffs; and new parties may be added and summoned in, and parties misjoined may be dropped by order of the court at any stage of the cause, as it may deem the interests of justice to require. *Merwin v. Richardson*, 52 Conn. 225.

<sup>3</sup> *Cherry v. Monroe*, 2 Barb. Ch. 618; *Crosby v. Berger*, 4 Edw. Ch. 210;



ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur upon the ground that the other defendant is improperly joined with him in the suit.<sup>1</sup>

*Whitbeck v. Edgar*, 2 Barb. Ch. 106. The objection can only be taken by the parties improperly joined. *Miller v. Jamison*, 24 N. J. Eq. 41; *Warthen v. Brantley*, 5 Georgia 571; *Christian v. Crocker*, 25 Ark. 827; *Gartland v. Nunn*, 11 Ark. 720; *Toulmin v. Hamilton*, 7 Ala. 362; *Western Compound Co. v. Aetna Ins. Co.*, 40 Wis. 873; *Payne v. Berry*, 8 Tenn.

Ch. 154. Where the answer of one of several defendants objects to a bill for want of proper parties, and the controversy as to that defendant is settled before the final hearing, the objection will be disregarded. *Booraem v. Wells*, 19 N. J. Eq. 87.

<sup>1</sup> *Cherry v. Monro* (1848), 2 Barb. Ch. 618.

## CHAPTER IV.

### THE BILL.

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| <p>§ 81. Informations.</p> <p>82. Definition and classification of bills.</p> <p>83. Authority to file a bill.</p> <p>84. Signature to a bill.</p> <p>85. Affidavit to the bill.</p> <p>86. The same subject continued.</p> <p>87. The several parts of a bill.</p> <p>88. The address and introduction.</p> <p>89. The stating part.</p> <p>90. The interrogating part.</p> <p>91. Prayer for general relief.</p> <p>92. The same subject continued.</p> <p>93. Prayer for special relief.</p> <p>94. The prayer for process.</p> <p>95. General principles of equity pleading.</p> <p>96. The same subject continued.</p> <p>97. The same subject continued — Illustrations.</p> <p>98. The same subject further illustrated.</p> <p>99. Relief <i>secundum allegata et probata</i>.</p> <p>100. The same subject continued.</p> <p>101. Jurisdictional averments.</p> <p>102. The same subject continued.</p> <p>103. Jurisdictional averments in the federal courts.</p> <p>104. The same subject continued.</p> <p>105. Allegations of parties' interests.</p> <p>106. Allegations in excuse for laches.</p> <p>107. Allegations of fraud.</p> <p>108. The same subject continued.</p> <p>109. Scandal and impertinence.</p> <p>110. The same subject continued.</p> <p>111. Objections for scandal and impertinence.</p> | <p>§ 112. The same subject continued.</p> <p>113. Inconsistent allegations.</p> <p>114. Bills with a double aspect.</p> <p>115. Multifariousness generally.</p> <p>116. The same subject continued.</p> <p>117. Multifariousness in matter — Bills held multifarious.</p> <p>118. The same subject continued — Bills held not multifarious.</p> <p>119. Multifariousness by misjoinder of complainants.</p> <p>120. The same subject continued — Illustrations.</p> <p>121. Multifariousness by misjoinder of defendants.</p> <p>122. The same subject continued — Bills held multifarious.</p> <p>123. The same subject continued — Bills not multifarious.</p> <p>124. Multifariousness of bills by and against officers and stockholders.</p> <p>125. Two or more good grounds of suit required.</p> <p>126. Objections for multifariousness, how taken.</p> <p>127. Objection, by whom taken.</p> <p>128. Demurrer for multifariousness.</p> <p>129. Summary statement of the doctrine of multifariousness.</p> <p>130. Bills of discovery.</p> <p>131. The same subject continued.</p> <p>132. Bills for foreclosure.</p> <p>133. The same subject continued.</p> <p>134. Bills to redeem.</p> <p>135. Bills for partition.</p> <p>136. Bills to quiet title.</p> <p>137. Bills to reform instruments.</p> |
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§ 81. Informations.— When a suit is instituted on behalf of the government, the matter of complaint is offered to the court by way of information, given by the attorney-general or solicitor-general. When the suit immediately concerns the rights of the government alone its officers proceed purely by information.<sup>1</sup> When the suit immediately concerns the rights of the State, the information is generally exhibited without a relator.<sup>2</sup> In other cases the name of a relator is inserted in the information, who is answerable to the court and to the parties for the propriety and conduct of the suit, and may be responsible for costs if the suit was improperly instituted.<sup>3</sup> When the relator has an interest in the matter in dispute, his bill is incorporated with the information, and then they form together an information and bill and are so

<sup>1</sup> Story's Equity Pleading (10th ed.), § 8. Where a nuisance is purely public, the proceeding to restrain it must be by information by the attorney-general. *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 394.

<sup>2</sup> *Attorney-General v. Delaware &c. R. Co.*, 27 N. J. Eq. 1; s. c., affirmed on appeal, 27 N. J. Eq. 681.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 8.

termed.<sup>1</sup> A suit brought by the United States to set aside or annul a government patent for land is instituted and controlled by the attorney-general as the head of the department of justice.<sup>2</sup> But a bill on behalf of the United States to set aside patents on the ground that they were obtained by fraud is well brought under the direction of the solicitor-general when the attorney-general is under disability to take part in the case.<sup>3</sup>

**§ 82. Definition and classification of bills.**—A bill in equity is in the nature of a petition to the court, setting forth the material facts, and concluding with a prayer for the appropriate relief, or other things required of the court, and for the usual process against the parties against whom the relief or other thing is sought, to bring them before the court to make due answer in the premises.<sup>4</sup> The most general division of bills is into those which are original and those which are not original. Original bills are those which relate to some matter not before litigated in the court by the same persons standing in the same interests.<sup>5</sup> Bills not original

<sup>1</sup> Story's Equity Pleading (10th ed.), § 8. In such case the attorney-general cannot withdraw the use of the State's name to the prejudice of the relator. *People v. North San Francisco Ass'n*, 88 Cal. 564.

<sup>2</sup> *United States v. San Jacinto Tin Co.*, 125 U. S. 278.

<sup>3</sup> *United States v. Bell Telephone Co.*, 128 U. S. 316. A bill was signed "Charles Devens, Attorney-General. By Philip Teare, United States Attorney for the District of California." The production of a certified copy of an order from the attorney-general to a United States district attorney to proceed in the case was held sufficient to overcome the objection that the bill did not show on its face that it was filed by the attorney-general. *Mullan v. United States*, 118 U. S. 271. An information filed by the United States district attorney in the United States district court of

New York, in his own name on behalf of the United States, to foreclose a mortgage, was sustained, that being the form used for a long time in the United States courts sitting in New York. But the court recommended a uniform practice, and that the proceeding should be in the name of the United States. *Benton v. Woolsey*, 12 Pet. 27. As to proceedings by information against purprestures and public nuisances, *State v. Wheeling Bridge Co.*, 18 How. 518; *Attorney-General v. Jamaica Pond Aqueduct Co.*, 183 Mass. 861; *Attorney-General v. Hare*, 50 Mich. 447; Story's Equity Pleading (10th ed.), § 8, note a.

<sup>4</sup> Mitford's Eq. Pl. by Jeremy, 7; Story's Equity Pleading (10th ed.), § 7.

<sup>5</sup> Mitford's Eq. Pl. by Jeremy, 88; Story's Equity Pleading (10th ed.), § 16.

are those which relate to some matter already litigated in the court by the same persons, and which are either in addition to or a continuance of an original bill, or both.<sup>1</sup> Bills in the nature of original bills are those which serve to bring before the court the proceedings and decree in a former suit for the purpose of either obtaining the benefit of the same or procuring the reversal of the decision made therein.<sup>2</sup> Original bills are of two kinds: those which pray relief and those which do not pray relief. Those praying relief consist (1) of bills praying the decree or order of the court touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right; (2) bills of interpleader, and (3) bills of *certiorari*.<sup>3</sup> Original bills not praying relief are of two kinds: (1) bills to perpetuate the testimony of witnesses, and (2) bills of discovery.<sup>4</sup> Bills not original are bills of revivor, supplemental bills, and bills of revivor and supplement. Bills in the nature of original bills are bills in the nature of supplemental bills, bills in the nature of bills of revivor, cross-bills, bills of review, bills impeaching decrees upon the ground of fraud, bills to suspend the operation of decrees on special circumstances or to avoid them on the ground of matter subsequent, and bills partaking of the qualities of some one or more of these bills.<sup>5</sup>

§ 83. **Authority to file a bill.**—As a general rule when a suit is commenced or defended by a solicitor of the court, or any other proceeding had therein, the court does not inquire into his authority to appear for his supposed client.<sup>6</sup> Where a suit is commenced in the names of several persons by their solicitors, the court will not inquire whether such suit was authorized by all, unless some of them object to the proceedings or the adverse party shows affirmatively that the suit is

<sup>1</sup> Story's Equity Pleading (10th ed.), § 16.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 16.

<sup>3</sup> Story's Equity Pleading (10th ed.), §§ 17, 18.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 19.

<sup>5</sup> Story's Equity Pleading (10th ed.), §§ 16-24.

<sup>6</sup> American Ins. Co. v. Oakley, 9 Paige, 496. See, also, Burns v. Lynde, 6 Allen, 805.

commenced and carried on in the names of some of the parties without authority.<sup>1</sup> Where a party for whom a solicitor appears denies his authority and applies to the court for relief before the adverse party has acquired any rights or suffered any prejudice in consequence of the acts of such solicitor, the court may correct the proceedings, and compel the solicitor to pay the costs to which the parties have been subjected in consequence of his improper interference.<sup>2</sup> If the adverse party, however, has acquired rights, or been subjected to costs, by proceedings in the name of a party who denies the authority of the attorney or solicitor who commenced the proceedings, and the attorney or solicitor is solvent and responsible, the court usually allows the proceedings to stand, and leaves the party injured to his remedy against such attorney or solicitor by a summary application to the court or otherwise.<sup>3</sup> A rule requiring the solicitor to pay costs for making use of a party's name without consent cannot apply when he has been employed by one of several executors or administrators and has acted in the name of all.<sup>4</sup> A party cannot change his solicitor without an order of the court.<sup>5</sup>

<sup>1</sup> *Bank Com'rs v. Bank of Buffalo*, 6 Paige, 497.

<sup>2</sup> *American Ins. Co. v. Oakley* (1842), 9 Paige, 496.

<sup>3</sup> *American Ins. Co. v. Oakley*, 9 Paige, 496. A board of health being charged by statute to take all necessary measures to prevent the exercise of any trade in violation of its order, may for that purpose, without special authority, bring suit in the name of the city. In such a suit, as in others brought in the name of the city, the bill may properly be signed by the mayor. *Taunton v. Taylor* (1874), 116 Mass. 255.

<sup>4</sup> *Dare v. Allen*, 2 N. J. Eq. 288. The governor of a state may authorize an attorney to bring an action in its name. *Texas v. White*, 7 Wall. 700. As a general rule if an agent institutes a suit under authority from his principal he must do so in the

name of the principal. *Oakey v. Bend*, 8 Edw. Ch. 482.

<sup>5</sup> *Mumford v. Murray*, Hopk. Ch. 869; *Stevenson v. Stevenson*, 8 Edw. Ch. 890. Whether the complainant can file a supplemental bill, or an original bill in the nature of a supplemental bill, by a new solicitor, without an order to change the former solicitor, on record, *quære*. *McLaren v. Charrier*, 5 Paige, 580. Upon the death of the solicitor for non-resident complainants, the court allowed notice to be sent to them through the postoffice for an order that they appoint another solicitor within thirty days. *Draper v. Holland*, 8 Edw. Ch. 272. Upon motion to change a solicitor the court will not make the payment of the solicitor's costs a condition of the substitution, but will leave him to his remedy at law against the client and preserve

§ 84. **Signature to a bill.**—It is a rule adopted at as early a period as the time of Sir Thomas More that all bills in equity, whether original or not, must have the signature of counsel.<sup>1</sup> If the complainant sues in person the signature of counsel would probably be dispensed with.<sup>2</sup> The complainant's bill (not sworn to) need not be actually signed by the complainant in person. It is sufficient if it is signed by his solicitor and counsel.<sup>3</sup> Where a bill was filed without the signature of counsel, and was afterwards signed by him without permission of the court, it was ordered to be stricken off the files.<sup>4</sup> A bill which is defective for want of signature of counsel cannot be remedied after it is put upon the files unless under an order of court,<sup>5</sup> but it has been held not a ground of demurrer.<sup>6</sup> The bill may be ordered from the files by the court of its own motion for want of a signature.<sup>7</sup> The omission of the signatures of solicitors or counsel to a bill is a cause for moving to take the bill from the files.<sup>8</sup> If a bill purports at the beginning thereof to be brought by ten persons who are named therein as plaintiffs, but is in fact signed by only two of them, without any signature, either of themselves or of counsel, in behalf of the others, it is the bill of those two only.<sup>9</sup> A signature on the back is sufficient,<sup>10</sup> and a bill signed "A. B. by his solicitor, C. D.," containing no allegation that C. D. was authorized to sign it, is properly signed.<sup>11</sup> A petition for an injunction signed by "A. M. Allen," with extrinsic

to him any lien he may have on papers or a fund in court. *Stevenson v. Stevenson*, 8 Edw. Ch. 840.

<sup>1</sup> Story on Equity Pleading (10th ed.), § 47. "Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him, and the case laid before him, there is good ground for the suit in the manner in which it is framed." United States Equity Rule 24.

<sup>2</sup> Foster's Federal Practice (2d ed.), § 86, referring to U. S. R. S., § 747; 1 Hoffman's Ch. Pr. 97.

<sup>3</sup> *Hatch v. Eustaphie*, Clarke's Ch. 68.

<sup>4</sup> *Partridge v. Jackson*, 2 Edw. Ch. 520.

<sup>5</sup> *Partridge v. Jackson*, 2 Edw. Ch. 520.

<sup>6</sup> *Gove v. Pettis*, 4 Sandf. Ch. 403. *Contra*, *Dwight v. Humphreys*, 8 McLean, 104; *Kirkley v. Burton*, 5 Madd. 378.

<sup>7</sup> *French v. Dear*, 5 Ves. 547.

<sup>8</sup> *Gove v. Pettis* (1846), 4 Sandf. Ch. 403; *Dillon v. Francis*, 1 Dick. 68; *Carey v. Hatch*, 2 Edw. Ch. 190.

<sup>9</sup> *Chapman v. Banker & Tradesman Pub. Co.*, 128 Mass. 478.

<sup>10</sup> *Dwight v. Humphreys*, 8 McLean, 104.

<sup>11</sup> *Pope v. Salamanca Oil Co.*, 115 Mass. 286.



evidence of identity, is sufficient.<sup>1</sup> But a signature to a bill in the firm name of two counselors, who are in partnership, is sufficient.<sup>2</sup> Bills must be signed *by* counsel. Signing the name of counsel is not a compliance with the rule, either in spirit or letter.<sup>3</sup>

§ 85. *Affidavit to the bill.*—Where a particular allegation is inserted in a bill for the purpose of transferring the jurisdiction from a court of law to a court of equity, the bill, or rather that particular allegation in the bill, must be verified by the oath of the complainant, or by the oath of some other person on his behalf who knows the fact.<sup>4</sup> Thus a bill seeking a discovery of deeds or writings sometimes prays relief founded on the deeds or writings of which the discovery is sought. If the relief so prayed be such as might be obtained at law, if the deeds or writings were in the custody of the plaintiff, he must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are unless they are in the hands of the defendant. But a bill for a discovery merely, or which only prays the delivery of deeds or writings or equitable relief grounded upon them, does not require such an affidavit.<sup>5</sup> If a plaintiff should seek to obtain a discovery from the defendant of a bond lost or destroyed, and also relief consequent upon the discovery, he is required to make a suggestion in his bill that without such discovery he has not sufficient evidence to maintain a suit at law, and also to annex an affidavit of the loss or destruction of the bond: for if it is not lost or destroyed, or if he has other sufficient evidence to establish its contents in proof, his proper remedy is not at law, and for want of such averments his bill would be demurrable.<sup>6</sup> A bill averring that defendant

<sup>1</sup> *Carlton v. Rugg*, 149 Mass. 550.

<sup>2</sup> *Hampton v. Coddington* (1877), 28 N. J. Eq. 557.

<sup>3</sup> *Davis v. Davis*, 19 N. J. Eq. 180; *Roach v. Hulings*, 5 Cranch, 637; *Pope v. Salamanca Oil Co.*, 115 Mass. 288; *Eveland v. Stephenson*, 45 Mich. 394.

<sup>4</sup> *Alston v. Jones* (1848), 3 Barb. Ch. 897. Affidavits in the United States circuit or district courts may be taken

by a commissioner of the circuit court for the district. U. S. R. S., § 945.

<sup>5</sup> *Story's Equity Pleading*, §§ 288, 477; *Livingston v. Livingston*, 4 Johns. Ch. 294. After proof taken it is too late to urge that an affidavit of the loss of a deed was not filed with the bill. *Bennett v. Waller*, 28 Ill. 97.

<sup>6</sup> *Story's Equity Pleading* (10th ed.), § 813. If the defendant by his answer does not admit the loss, the

has property subject to the payment of his debt, but that its kind, description and manner of holding are concealed from and unknown to complainants, should be sworn to.<sup>1</sup> A bill to perpetuate testimony must be accompanied by an affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost.<sup>2</sup> A bill praying for an injunction generally requires a special affidavit to support it.<sup>3</sup> In the federal courts, whenever a bill for an injunction is to be used as evidence either upon a motion for preliminary injunction or in any other way, it must be verified; but there is no imperative rule requiring a verification of a bill at the time it is signed which prays for an injunction.<sup>4</sup> A bill of interpleader should be supported by an affidavit that the plaintiff does not collude with either of the defendants.<sup>5</sup> In the federal courts "every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified under oath."<sup>6</sup>

§ 86. The same subject continued.-- Under a statute requiring a petition by a creditor for a warrant to seize the

complainant is put upon his proof. *Miller v. Wack*, 1 N. J. Eq. 205. Though the affidavit be not filed with the bill it is one of those defects which may be supplied in the progress of the cause where there has been no demurrer to the bill for want of it. *Thornton v. Stewart*, 7 Leigh, 128. In the courts of Connecticut an affidavit need not be annexed to a bill in any case, *Nash v. Smith*, 6 Conn. 421; *Jerome v. Jerome*, 5 Conn. 352; nor in Massachusetts, *Burns v. Lynde*, 6 Allen, 305.

<sup>1</sup> *Sweetzer v. Buchanan* (Ala.), 10 So. Rep. 552, following *Lawson v. Warren*, 89 Ala. 584.

<sup>2</sup> *Story's Equity Pleading* (10th ed.), §§ 304, 309.

<sup>3</sup> *Hammersley v. Wyckoff*, 8 Paige, 72; *Bogert v. Haight*, 9 Paige, 297; *Hatch v. Eustaphie*, 1 Clarke Ch. 63; *Holdredge v. Gwynne*, 18 N. J. Eq. 26, 32; *Perkins v. Collins*, 8 N. J.

Eq. 482. It may be verified by an attorney, *Youngblood v. Schamp*, 15 N. J. Eq. 42; by statute in Texas, *Edrington v. Allsbrooks*, 21 Tex. 186.

<sup>4</sup> *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618, 622. See, also, *Hughes v. Northern Pac. Ry. Co.*, 18 Fed. Rep. 106, 110; *Woodworth v. Edwards*, 3 Woodb. & M. 120, 123. Where a complainant comes into court with a sworn bill, and it turns out upon investigation that the bill has been framed with skill and care, to avoid an impression which would be made by an ingenuous statement of the case, the complainant assumes a position in the court which deprives him of the benefit of doubts which might otherwise be resolved in his favor. *Herbert v. Scofield*, 9 N. J. Eq. 492.

<sup>5</sup> See § 145, *infra*.

<sup>6</sup> United States Equity Rule 94.

estate of an insolvent debtor to be "verified by oath," an affidavit that the allegations in the petition are true according to the best of the knowledge and belief of the affiant is sufficient.<sup>1</sup> An injunction bill which is filed by a corporation may be verified by the solicitor or counsel, or other agent, without the oath of any of the regular officers, where the person verifying the bill is better acquainted with the facts than any of such officers.<sup>2</sup> The oath of a Jew complainant to an injunction bill must be made according to the form and solemnities of the Jewish religion.<sup>3</sup> The jurat to a bill of complaint is not rendered defective by the want of the statement of the county where the bill was sworn to.<sup>4</sup> An affidavit of a person other than the complainant that "each and every allegation contained in the bill are true so far as they are known to him personally, and so far as he has heard he believes them to be true," is insufficient to sustain an injunction.<sup>5</sup> And so is the oath of an attorney that statements "are true when made on his own knowledge, and when made upon information of others he believes them to be true," where it does not appear from the bill that any one of the statements was made upon the knowledge of the affiant or information of others.<sup>6</sup>

§ 87. **The several parts of a bill.**—Formerly a bill in equity consisted of nine parts, some of which were not essential, and might be used or omitted at the discretion of the person who prepared it. The several parts were: (1) The address; (2) the introduction; (3) the stating part; (4) the confederating part; (5) the charging part; (6) the jurisdictional clause; (7) the interrogating part; (8) the prayer for relief; (9) the prayer of process.<sup>7</sup> Of these the confederating part is now in general disuse,<sup>8</sup> and was never considered indispensa-

<sup>1</sup> *American Carpet Lining Co. v. Chipman*, 146 Mass. 385.

<sup>2</sup> *Bank of Orleans v. Skinner*, 9 Paige, 305.

<sup>3</sup> *Newman v. Newman*, 7 N. J. Eq. 26.

<sup>4</sup> *Barnard v. Darling*, 1 Barb. Ch. 218.

<sup>5</sup> *Chesapeake & Co. R. Co. v. Huse*, 5 West Va. 579.

<sup>6</sup> *Pullen v. Baker*, 41 Tex. 419.

<sup>7</sup> *Story's Equity Pleading* (10th ed.), §§ 26-44.

<sup>8</sup> The usual form was that the defendants, combining and confederating together, and with divers other persons as yet to the plaintiffs unknown, but whose names when discovered he prays may be inserted in the bill, and they be made parties defendant thereto, etc. *Story's Equity Pleading* (10th ed.), § 29.

ble;<sup>1</sup> its use is expressly made optional in the federal courts,<sup>2</sup> and has been forbidden by statute in some of the States. The charging part<sup>3</sup> is often omitted, and is also rendered unnecessary in the federal courts, and does not seem indispensable in any case.<sup>4</sup> The jurisdiction clause is intended to give jurisdiction to the court by a general averment that the acts complained of are contrary to equity, and tend to the injury of the plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity. This clause is a mere superfluity,<sup>5</sup> for if the case made is not of equitable jurisdiction the bill will be dismissed notwithstanding such an averment is made in it.<sup>6</sup>

§ 88. The address and introduction.— In the United States a bill is addressed to the court from which it seeks relief by its appropriate and technical description, and the address must be varied accordingly.<sup>7</sup> The introductory part usually contains the names and description of the persons exhibiting the bill, the character in which they sue, and such other description as is necessary and proper to found the jurisdiction of the court, and sometimes the names and descriptions of the defendants, although the latter are more usually found in the stating part.<sup>8</sup> The United States Equity Rules provide as

<sup>1</sup> *Comstock v. Herron*, 45 Fed. Rep. 660; *Story's Equity Pleading* (10th ed.), § 29 *et seq.*

<sup>2</sup> Equity Rule 21.

<sup>3</sup> Which “usually consists of some allegation or allegations which set forth the matters of defense or excuse which it is supposed the defendant intends or pretends to set up to justify his non-compliance with the plaintiff's right or claim, and then charges other matters which disprove or avoid the supposed defense or excuse. It is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiff to admit; for which purpose the charge of the

pretense of the defendant is held to be sufficient.” *Story's Equity Pleading* (10th ed.), § 31; *Freichnecht v. Meyer*, 89 N. J. Eq. 551-554.

<sup>4</sup> Equity Rule 21; *Freichnecht v. Meyer*, 89 N. J. Eq. 551.

<sup>5</sup> See United States Equity Rule 21.

<sup>6</sup> *Story's Equity Pleading* (10th ed.), § 34.

<sup>7</sup> *Story's Equity Pleading* (10th ed.), § 26. But if the name of the judge were also prescribed in the statutory form, it would seem to be sufficient if it were omitted, provided the court were correctly described. *Gibson's Suits in Chancery*, § 186.

<sup>8</sup> *Story's Equity Pleading* (10th ed.), § 26. See, also, *Foster's Federal Practice* (2d ed.), § 66. In *Gibson's Suits in Chancery*, § 187, it is said to

follows:<sup>1</sup> — “Every bill in the introductory part thereof shall contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form in substance shall be as follows: To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —, and therefore your orator complains and says that,” etc. The necessity of proper jurisdictional averments, especially in the federal courts, has been pointed out in other parts of this work.<sup>2</sup>

§ 89. The stating part.—The most important part of a bill in equity is that denominated the “stating part,” in which should be set forth all the facts fundamentally material to the complainant’s case, actually essential to it as a portion of its very consistency, and none others.<sup>3</sup> Care should be taken to frame this part fully and accurately and to state every material essential to the plaintiff’s case; for if the proof should disclose a good ground for relief which is not shown in the bill, it will not avail the plaintiff without an amendment of his bill, which, however, is very generally allowed.<sup>4</sup> The stating part of a bill cannot be enlarged by the terms of the prayer for relief. Thus, if the stating part shows no ground for an account, a prayer for an account does not entitle the plaintiff to maintain his bill.<sup>5</sup> And so if a plea is put in, its validity will be determined by examining the stating part of the bill and not with reference to the interrogatory part.<sup>6</sup> A general charge or statement of the matter of fact is sufficient; and it is not generally necessary to charge minutely all the circumstances which may conduce to prove the general charge.<sup>7</sup>

be the practice to insert the names of all the parties, defendants as well as complainants, next after the address; and in the learned author’s opinion “it is the best possible practice.” *Cf.* *Leavenworth v. Pepper*, 82 Fed. Rep. 718.

<sup>1</sup> Equity Rule 20.

<sup>2</sup> See §§ 103, 104, *infra*, and § 28 *et seq.*, *supra*.

<sup>3</sup> *Farren’s Bill in Chancery*, pp. 15, 80.

<sup>4</sup> See §§ 99, 100, 161, *infra*; *Story’s Equity Pleading* (10th ed.), §§ 27, 28.

<sup>5</sup> *Bushnell v. Avery*, 121 Mass. 148.

<sup>6</sup> *Story’s Equity Pleading* (10th ed.), § 27.

<sup>7</sup> *Story’s Equity Pleading* (10th ed.), § 28. See, however, § 95, n. 1, on p. 121, §§ 106, 107, 108, *infra*.

**§ 90. The interrogating part.**—The interrogating part of a bill was formerly one of its most important features, but now that all parties are competent witnesses, a discovery is not often sought.<sup>1</sup> The general interrogatory is substantially as follows:—“That the defendant may full answer make to all and singular the premises, fully and particularly, as though the same were repeated and he specially interrogated,” etc.<sup>2</sup> But a prayer in a bill that the defendants may each be required “to answer unto the premises” was held to be a good general interrogatory.<sup>3</sup> Although under a general interrogatory defendant must answer fully and circumstantially the charges of the bill, it is common, where a discovery is sought, to add to the general requisition a repetition by way of interrogatory of the matters most essential to be answered, adding to the inquiry, after each fact, an inquiry of the several circumstances attending upon it and their variation, with a view to prevent evasion.<sup>4</sup> The defendant is not bound to answer a particular interrogatory unless it is justified by allegations in the bill, but if he does answer and the answer is replied to the informality is cured.<sup>5</sup> But a variety of questions may be founded on a single charge in the bill, if they are relevant to it.<sup>6</sup>

<sup>1</sup> Gibson's Suits in Chancery, § 182.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 877; *Ames v. King*, 9 Allen, 258.

<sup>3</sup> *McClaskey v. Barr*, 40 Fed. Rep. 559. Chancery rule 18 (Code Ala., p. 812), prescribing a form to precede the interrogating part of a bill, has no application to bills containing no interrogating part. *Thornton v. Sheffield &c. R. Co.*, 84 Ala. 109; s. c., 4 So. Rep. 197. By Mass. Stats. 1883, ch. 223, sec. 10, if a bill asks for relief and discovery the discovery can only be had by interrogatories. *Amy v. Manning*, 149 Mass. 487, 491. A prayer that the defendant make answer to the matters alleged therein is a good general interrogatory, and a sufficient compliance with a chancery rule requiring that bills in equity shall conclude with a general interrogatory, although it is coupled with

a prayer for process, and is followed by a prayer for specific and general relief. *Ames v. King*, 9 Allen, 258.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 36. Interrogatories are now regulated in the federal courts by Equity Rules 98, 41, 42, 43 and 44. See the Appendix. Interrogatories appended to the bill, and based on the statements and charges therein made, may be regarded as incorporated in the bill, and a prayer for a responsive answer thereto, on oath, is not demurrable. *Romaine v. Hendrickson's Ex'rs*, 24 N. J. Eq. 281.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 36.

<sup>6</sup> Story's Equity Pleading (10th ed.), § 37. The criterion of immateriality of interrogatories in a bill is not whether an affirmative answer will prove the bill, but whether it will

The defendant is not bound to answer interrogatories when his answer will tend to subject him to a penalty or forfeiture, or to punishment for a criminal offense.<sup>1</sup>

**§ 91. Prayer for general relief.**—The eighth part of a bill in equity is the prayer for relief. The bill usually contains a prayer for general relief. For although the complainant may not be entitled to the relief specifically prayed for, he may under the general prayer obtain any other specific relief consistent with the case made by the bill.<sup>2</sup> Upon a bill for an injunction to prevent a threatened trespass, the court may, under a prayer for general relief and in order to avoid a multiplicity of suits, award damages for the injury done by such

tend to prove the bill. *Uhlmann v. Arnholt & Co. Brewing Co.*, 41 Fed. Rep. 369.

<sup>1</sup> As, for instance, a penalty for breach of the Sabbath by executing a note on that day. *Stewart v. Drasha*, 4 McLean, 563; 1 Daniell's Ch. Pr. (5th ed.) 563, 716.

<sup>2</sup> *Colton v. Ross*, 2 Paige, 896; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *English v. Foxall*, 2 Pet. 595; *Texas v. Hardenberg*, 10 Wall. 68; *Graham v. Berryman*, 19 N. J. Eq. 29; *Miller v. Jamison*, 24 N. J. Eq. 41; *Force v. Dutcher*, 18 N. J. Eq. 401, 405; *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; *Shelby v. Tardy*, 84 Ala. 327; s. c., 4 So. Rep. 276; *Franklin v. Greene*, 2 Allen, 519. Such relief as is necessary to carry into effect the particular relief demanded will be granted. *Mitchell v. Moore*, 95 U. S. 587. Where a case for relief is made out in the bill, it may be given by imposing conditions on the complainant, consistently with the rules of equity, in the discretion of the court. *Walden v. Bodley*, 14 Pet. 156. A complainant may have relief even against the admissions in his bill. *Finley v. Lynn*, 6 Cranch, 238. Where the particular relief prayed for has become impossible by

the act of the defendant, the court may grant appropriate relief under the general prayer. *Enfield Toll Bridge Co. v. Hartford & Co. R. Co.*, 17 Conn. 42. As to the granting of relief under the general prayer, the court said in *Hill v. Beach*, 12 N. J. Eq. 31, 35:—"If the facts which he states are broad enough to give him relief, it matters not how narrow his prayer may be, if his bill contains a prayer for general relief. And although he may claim a relief not at all warranted by his facts, or may be entitled to a relief upon very different principles of equity from what he supposed, such a misapprehension of his case cannot defeat his right to relief." See, also, *Merchants' Nat. Bank v. Hogle*, 25 Ill. App. 543. Under a general prayer for relief any relief may be granted for which the basis is laid in the bill; and where a bill for specific performance of a contract to purchase land alleged the possession of the land by the defendants, but contained no specific prayer for rents and profits, it was held proper to afford the complainant that relief, the court refusing to compel specific performance on account of his defective title. *Watts v. Waddle*, 6 Pet. 382.



trespass before the injunction was issued.<sup>1</sup> On a bill filed by a *cestui que trust*, praying for an account, the removal of the trustees, payment to complainant of the trust money and for general relief, it was held proper to appoint a new trustee and order payment of the fund to him.<sup>2</sup> In a bill to establish title, praying that defendant be ordered to remove his buildings from the land in dispute, the court may, under the prayer for general relief, make a like order in respect to streets upon which the land abuts.<sup>3</sup> Where the prayer of a bill was chiefly directed toward securing a right to redeem from a mortgage, but the general object was to secure to the plaintiff a dower interest of which she had been defrauded, and the bill contained a prayer for general relief, it was held that the court might decree such relief as the facts stated in the bill would justify.<sup>4</sup> On a bill by a second mortgagee to set aside a sale made under the first mortgage to the owner of the equity of redemption, the prayer for general relief will sustain a decree to restrain the purchaser from committing waste.<sup>5</sup> If a bill is brought for the sale of an estate upon which a charge is created in favor of the complainant and fails to obtain that form of relief, it may nevertheless be maintained to declare and enforce the charge under the prayer for general relief.<sup>6</sup> According to the weight of authority, a receiver may be appointed under a prayer for general relief.<sup>7</sup>

§ 92. The same subject continued.—The court, under the prayer for general relief, will grant such relief only as the

<sup>1</sup> Winslow v. Nayson, 113 Mass. 411; Omaha Horse Ry. Co. v. Cable Tramway Co., 82 Fed. Rep. 727. A bill will not be dismissed on account of the incongruousness and inaptness of the special prayers for relief. Even if the special prayers were such that no relief could be granted under them, the court, under the general prayer, may grant any appropriate relief consistent with the case made by the bill. Annin v. Annin, 24 N. J. Eq. 184.

<sup>2</sup> Mitchell v. Moore, 95 U. S. 587.

<sup>3</sup> Gormley v. Clark, 184 U. S. 838, 850.

<sup>4</sup> Jones v. Van Doren, 130 U. S. 684.

<sup>5</sup> Thompson v. Heywood, 129 Mass. 401.

<sup>6</sup> Nudd v. Powers, 136 Mass. 278. A bill for the specific enforcement of a contract, which also contains a prayer for general relief, is sufficient, where the evidence justifies it, to sustain a decree for the payment of money. Cushman v. Bonfield (Ill.), 28 N. E. Rep. 937.

<sup>7</sup> Story's Equity Pleadings (10th ed.) § 43, note b.

case stated in the bill and sustained by the proof will justify.<sup>1</sup> Under a prayer for general relief a party cannot recover a claim distinct from that demanded by the bill.<sup>2</sup> Where complainant filed a bill to restrain the obstruction of a water-course flowing through his own and defendant's land, it was held that he was not entitled, under the prayer for general relief, to an injunction restraining defendant's obstruction of the flowage on his land outside of the location of the alleged water-course.<sup>3</sup> Upon a bill to recover the interest of a legacy only, a decree cannot be made for the payment of the principal which has fallen due since the filing of the bill. Such decree is not within the special prayer for relief, and could not have been prayed for at the time of filing the bill.<sup>4</sup> Where complainant in a bill for specific performance of an agreement to convey land fails to establish his claim to that relief, he cannot, under the prayer for general relief, have a decree for the repayment of the money paid on the contract. The court said:—"The complainant, having failed on his only ground for equitable relief, cannot have his suit retained for granting a relief to which he is only entitled at law."<sup>5</sup> Where plaintiff sought to have his title confirmed against purchasers from his grantee, averring the execution and delivery of his deed to the grantee, he was not allowed to attack the validity of the deed under the prayer for general relief.<sup>6</sup>

§ 93. Prayer for special relief.—As a general rule a plaintiff cannot have an injunction under the prayer for general relief; but it must be expressly prayed.<sup>7</sup> If a writ of *ne exeat* is desired it is prudent to specially pray for it, although it has been held that it may be granted in a proper case under the prayer for general relief.<sup>8</sup>

<sup>1</sup> *Hobson v. McArthur*, 16 Pet. 182; *Allen v. Pullman's Palace Car Co.*, 189 U. S. 658, 662; *Rennie v. Crombie*, 12 N. J. Eq. 457, and the cases cited in the first note to the preceding section.

<sup>2</sup> *Pickens v. Knisely*, 29 West Va. 1.

<sup>3</sup> *Rigg v. Hancock*, 36 N. J. Eq. 42.

<sup>4</sup> *Jordan v. Clark*, 16 N. J. Eq. 243.

<sup>5</sup> *Welch v. Bayaud*, 21 N. J. Eq. 186, 187.

<sup>6</sup> *Mackall v. Casilear*, 187 U. S. 556.

<sup>7</sup> *Story's Equity Pleading* (10th ed.), § 41. See *United States Equity Rule* 21.

<sup>8</sup> *Gilbert v. Colt*, 14 Am. Dec., 561, n. ;

*Shainwald v. Lewis*, 46 Fed. Rep. 839 ;

*Durham v. Jackson*, 1 Paige, 622.

§ 94. **The prayer for process.**—The ninth part of a bill is the prayer of process to compel the defendant to appear and answer the bill and abide the determination of the court on the subject. The ordinary process prayed is a writ of subpoena, which requires the defendant to appear and answer the bill on a certain day named in the writ, under a certain penalty.<sup>1</sup> The rule is that a person against whom process of subpoena is not prayed, although he is named in the bill, is not a defendant to the suit.<sup>2</sup> Where there was no prayer of

United States Equity Rule 21, requiring a special prayer for a *ne exeat*, is expressly limited to cases where the writ is asked for "pending the suit." *Lewis v. Shainwald*, 7 Sawy. 408, where Sawyer, C. J., said:—"It is sufficient if the facts alleged in the bill show a proper case for the writ, and it may be granted in the decree under the prayer for general relief. Or the facts may be shown and the writ applied for upon a petition presented in the case either before or after judgment or decree." An injunction, a receiver and a *ne exeat* may all be resorted to in the same suit to aid the court in doing justice between the parties. *Kirby v. Kirby*, 1 Paige, 261. If relief is asked to which the complainant is not entitled, the bill is demurrable. *Jordan v. Clark*, 16 N. J. Eq. 248. Under a special prayer, relief of the same general character but less extensive may be granted, or the prayer may be amended if necessary. *Camden Horse R. Co. v. Citizens' Coach Co.*, 81 N. J. Eq. 525. Where all the necessary facts are alleged in the complaint, the court has power to grant full relief, without regard to the prayer. *Muehlberger v. Schilling*, 8 N. Y. Supl. 705.

<sup>1</sup> Story's Equity Pleading (10th ed.), § 44. "The prayer for process of subpoena in the bill shall contain the names of all the defendants named

in the introductory part of the bill, and if any of them are known to be infants, under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require upon the return of the process. If an injunction or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process." United States Equity Rule 28.

<sup>2</sup> *Talmadge v. Pell*, 9 Paige, 410, 412. Where a person is sued in a personal and also a representative capacity, process should be prayed against him in both capacities. *Carter v. Ingraham*, 48 Ala. 78. In New Hampshire the prayer may in most cases be omitted. Equity Rule 2, 88 N. H. 605. "It is essential that the defendants should be clearly designated as such; but it cannot be material whether they are designated by praying process against them in the form of courts of equity, or by a positive allegation that they are impleaded as defendants according to the forms of courts of law." *Elmendorf v. Delancey*, Hopk. Ch. 555, 556. But cf. 1 Daniell's Ch. Pr. (5th ed.) 890 and note. A prayer for process, in a bill, against "the said defendants," without naming anybody, where it does not appear with reasonable cer-

process against a corporation by its corporate name, but only against the officers thereof, and the corporation was not described in the bill as being a party thereto, it was held that the corporation was not before the court as a party to the suit.<sup>1</sup> A bill without a prayer of process is demurrable.<sup>2</sup>

**§ 95. General principles of equity pleading.**—The same precision of statement that is required in pleadings at law has never been attained in bills in equity.<sup>3</sup> Still, when principles have by repeated adjudications become settled, it is quite as important that they be preserved in a court of chancery as in a court of law.<sup>4</sup> “No rule of equity pleading is better settled than that which declares that every material fact which it is necessary for a complainant to prove to establish his right to the relief he asks must be alleged in the premises of his bill with reasonable fullness and particularity.”<sup>5</sup>

tainty, in the other parts of the bill, who are referred to as “the said defendants,” and in other parts of the bill some only of the persons who are necessary parties are mentioned as the defendants, is fatally defective, if necessary parties to the suit are thereby omitted. *Howe v. Robins*, 86 N. J. Eq. 19.

<sup>1</sup> *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438. When a bill, in its premises, sets forth sufficient facts to show that the complainant is entitled to relief as an executor, or that the defendant is liable as an executor, it is not necessary that either should be so styled in the commencement or conclusion of the bill. *Ransom v. Geer*, 30 N. J. Eq. 249; *Plant v. Plant*, 44 N. J. Eq. 18; *Evans v. Evans*, 28 N. J. Eq. 72. See, also, *White v. Davis*, 48 N. J. Eq. 22. A bill must state clearly the persons who are made defendants either by praying process against them or by a distinct allegation designating the persons impleaded as defendants. *Elmendorf v. Delancey*, Hopk. Ch. 555. Parties against whom relief is de-

manded must be designated by name in the complaint as defendants. *Anderson v. Wilson*, 100 Ind. 402.

<sup>2</sup> *Elmendorf v. Delancey*, 1 Hopk. Ch. 555.

<sup>3</sup> *Mutual Life Ins. Co. v. Sturges*, 88 N. J. Eq. 328, 337, holding it too late to complain at the hearing of mere want of precision in the bill; *Crane v. Deming*, 7 Conn. 387, 394; *Cornelius v. Halsey*, 11 N. J. Eq. 27; *Ransom v. Geer*, 30 N. J. Eq. 249; *Marselis v. Morris & Co.*, 1 N. J. Eq. 81. “The courts are not so much inclined to regard mere technicality in pleading as they were three-quarters of a century ago.” *McEwan v. Broadhead* (1855), 11 N. J. Eq. 129, 132. In *Phillips v. Schooley*, 27 N. J. Eq. 410, a demurrer was allowed for want of precision in the allegations in the bill.

<sup>4</sup> *Marselis v. Morris & Co.*, 1 N. J. Eq. 81.

<sup>5</sup> *Smith's Administrator v. Wood*, 42 N. J. Eq. 563, 566; *Philnower v. Todd*, 11 N. J. Eq. 55; *Kip v. Kip*, 33 N. J. Eq. 213; *Search v. Search*, 27 N. J. Eq. 137; *Harding v. Handy*.

There are some cases in which the same decisive and categorical certainty is required in a bill in equity as in a declaration at common law;<sup>1</sup> but certainty to a common intent is all that is ordinarily required.<sup>2</sup>

§ 96. The same subject continued.—Pleadings should consist of averment or allegations of fact, and not of inference and argument;<sup>3</sup> but it is proper to aver the facts and state the

11 Wheat. 103; *Drews v. Beard*, 107 Mass. 64, 78; *Phelps v. Elliott*, 85 Fed. Rep. 455, 461; *St. Louis &c. Ry. Co. v. Johnston*, 183 U. S. 577; *Shepard v. Shepard*, 6 Conn. 87. "It is an elementary rule of pleading that a bill must state all the facts on which the complainant's right to relief rests with certainty and clearness and positively." *Brokaw v. Brokaw*, 41 N. J. Eq. 215, 220. Uncertainty in material allegations is not fatal to a bill whose object is the discovery of material facts alleged to be entirely in the defendant's knowledge. *Watson v. Murray*, 28 N. J. Eq. 257. "While it is true that the bill should contain averments of the rights of the complainant alleged to be attacked and of the injury thereto inflicted or threatened by the defendant sufficient to invoke the jurisdiction of the court and sustain the relief asked, it is not always necessary that such injury be characterized by technical terms—the acts of the defendant detailed with particularity or proved to the extent specified. With reference to such acts, if there is in the bill substantial averment or the recital of facts which disclose to the defendant generally the ground of complaint, it will be sufficient on final hearing on the pleadings and proof, in a case where the facts cannot be within the knowledge of the acting party, if the grounds of relief are substantially involved in the statement of the bill and are sustained by the evidence."

*Mott v. Mott*, 49 N. J. Eq. 192, 195. *Outcault v. Disborough*, 8 N. J. Eq. 214; *Mutual Life Ins. Co. v. Sturges*, 83 N. J. Eq. 828, 837; *Goherty v. Bennett*, 87 N. J. Eq. 87; *Whelan v. Whelan*, 8 Cowen, 587, 571; *Brice v. Brice*, 5 Barb. 588, 541; *Deatly's Heirs v. Murphy*, 8 A. K. Marsh. 472, 474.

<sup>1</sup> "General allegations will not be sufficient where the bill seeks (1) to attach property, or (2) to have a receiver appointed, or (3) to obtain an injunction, or (4) to set aside a conveyance, a settlement or a contract, or (5) to reform a written instrument, or (6) to sell, re-invest or expend the property of minors, or (7) to set up a resulting or constructive trust, or (8) to have a specific performance of a contract, or (9) to obtain a divorce, or (10) to obtain a new trial at law, or (11) to review a former decree in equity, or (12) where in any case fraud is charged [see § 107, *infra*] or a trust is set up." *Gibson's Suits in Chancery*, § 201.

<sup>2</sup> *Randolph v. Daly*, 16 N. J. Eq. 814; *Goherty v. Bennett*, 87 N. J. Eq. 87; *Paterson &c. R. Co. v. Jersey City*, 9 N. J. Eq. 484; *O'Hare v. Downing*, 180 Mass. 16; *St. Louis v. Knapp*, 104 U. S. 658; *Mutual Life Ins. Co. v. Sturges*, 83 N. J. Eq. 828, 837.

<sup>3</sup> *Hood v. Inman*, 4 Johns. Ch. 487, 440. Facts must be averred, and not merely the evidence of them. *Hobart v. Frisbie*, 5 Conn. 592.

conclusions therefrom in an alternative form.<sup>1</sup> "Inasmuch as" is sufficiently direct and positive in a bill; more direct than any statement under a "whereas" in a declaration at law.<sup>2</sup> A statement of matters of fact in the form of a charge is sufficient, on general demurrer, where it is evident that a statement by way of allegation or averment was intended by the pleader.<sup>3</sup> If a fact is stated anywhere in the stating part of the bill with legal certainty, and is material, it is well pleaded, and therefore admitted by a demurrer.<sup>4</sup> Where a complainant claims the benefit of a statute, his bill must contain all the averments necessary to bring his case within its beneficial provisions.<sup>5</sup> But where the complainant predicates his right to the relief prayed for upon a statute, when he is in reality entitled to the relief only on general equitable grounds, the bill will not be dismissed for that reason.<sup>6</sup> An allegation in a bill that the petitioner "has been informed and believes, and therefore avers," is a sufficiently positive averment.<sup>7</sup>

<sup>1</sup> *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618. "Bills which are to be verified by the oath of the agent or attorney for a complainant should be drawn in the same manner as bills which are to be sworn to by the complainant himself, stating those matters which are within the personal knowledge of such agent or attorney positively. And those which he has derived from the information of others should be stated or charged upon the information and belief of the complainant, and the oath of the agent or attorney verifying the bill should state that the deponent has read the bill or heard it read, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated to be on the information or belief of the complainant, and that as to these matters the deponent believes it to be true." *Bank of Orleans v. Skinner*, 9 Paige, 805, 807.

<sup>2</sup> *Paterson &c. R. Co. v. Jersey City*, 9 N. J. Eq. 484.

<sup>3</sup> *Johnson v. Helmstaedter*, 80 N. J. Eq. 124.

<sup>4</sup> *Paterson &c. R. Co. v. Jersey City*, 9 N. J. Eq. 484.

<sup>5</sup> *Eberhart v. Gilchrist*, 11 N. J. Eq. 167.

<sup>6</sup> *Adams v. Kehlor Milling Co.*, 86 Fed. Rep. 212. Under the Connecticut Practice Act of 1879, which permits the joinder of legal and equitable causes of action, the facts upon which both kinds of relief are sought may be presented in a single count. *Trowbridge v. True*, 52 Conn. 190.

<sup>7</sup> *Wells v. Bridgeport Hydraulic Co.*, 80 Conn. 316; *Campbell v. Paris R. Co.*, 71 Ill. 611. But a mere allegation of information and belief is not sufficient. *Lucas v. Oliver*, 34 Ala. 626; *Cameron v. Abbott*, 80 Ala. 416; *Ewing v. Duncan* (Tex.), 16 S. W. Rep. 1000; *Messer v. Storer*, 79 Me. 512; s. c., 11 Atl. Rep. 275. See, also, *Walton v. Westwood*, 78 Ill. 125. Mere informalities or defective modes of statement in a bill are waived where no demurrer or motion of any sort is interposed, and.

When a bill truly sets forth sufficient facts to entitle complainant to relief, the pleader may or may not, at his option, aver additional cumulative facts which only intensify, without varying, the principle of relief claimed.<sup>1</sup>

§ 97. **The same subject continued — Illustrations.**— A bill to enforce payment of a debt out of the separate estate of a married woman need not set out any specific estate or property belonging to the defendant in her own right, but may allege generally that she is possessed of property to her sole and separate use which is chargeable with the payment of the debt.<sup>2</sup> An equitable attachment of debts due to the defendant, made by a suit in equity, ought to describe the nature of the debts and the persons who owe them.<sup>3</sup> In the complaint in an action to rescind a purchase of land it is not necessary to allege a disaffirmance, or a previous offer to reconvey, nor to make an offer in the pleading to do what the court may require as a condition of granting relief.<sup>4</sup> In alleging the legal organization of a corporation, it is unnecessary to state in detail that all the preliminary steps were taken.<sup>5</sup> A bill in equity to set aside a judgment against complainant in a suit of which he had no notice should show the character of the claim upon which the judgment is based, as well as the character of the defense, so that the court may see that there was a good defense that might have been made. A mere allegation that complainant has a good defense, "as he is advised," is insufficient.<sup>6</sup> While irremediable injury is a ground of equity jurisdiction, a general allegation of such injury, not stating facts on which the allegation is based, nor showing how or why the damages will be irremediable, is not sufficient.<sup>7</sup> A bill to rescind a contract of sale of land, which avers that defendants, by false representations that they had

after answer, the introduction of any evidence is objected to on the ground that the petition fails to state a cause of action. *Sayer v. Devore*, 99 Mo. 437; *s. c.*, 13 S. W. Rep. 201.

<sup>1</sup> *Noble's Adm'r v. Moses*, 81 Ala. 130; *s. c.*, 1 So. Rep. 217.

<sup>2</sup> *Rogers v. Ward* (1864), 8 Allen, 387.

<sup>3</sup> *Amy v. Manning*, 149 Mass. 487.

<sup>4</sup> *Knappen v. Freeman* (Minn.), 50 N. W. Rep. 588.

<sup>5</sup> *Pope v. Leonard*, 115 Mass. 288.

<sup>6</sup> *Jeffrey v. Fitch*, 46 Conn. 602, 608.

<sup>7</sup> *Willingham v. King*, 28 Fla. 478; *s. c.*, 2 S. Rep. 851; *Cresap v. Kemble*, 26 West Va. 608.



a sufficient title, induced plaintiffs to enter into the contract, when in fact the title was in another, of which plaintiffs were ignorant, is sufficient without alleging the facts to show want of title in defendants.<sup>1</sup> A bill or any other pleading which relies upon usury as its substance must distinctly state the terms of the usurious contract.<sup>2</sup> Upon a bill for relief against a usurious contract, the court is not authorized to decree payment to the defendant of the amount equitably due unless the complainant in his bill has offered to pay what is equitably due.<sup>3</sup> "If the party sets up a title to relief in equity on the ground of being a *bona fide* purchaser, he ought to deny notice in the most decided manner."<sup>4</sup> Where a party seeks the aid of a court of equity for relief against a forfeiture, he must aver in his petition that he is now ready and willing to pay the money.<sup>5</sup> A demurrer to a bill setting up a trust will not be sustained on the ground that the nature of the trust is not sufficiently set forth, when the facts stated are sufficient, if true, to enable the court to act intelligently.<sup>6</sup> It is proper to recite in a bill for infringement of a patent prior litigation over the same patent,<sup>7</sup> the state of the art, the steps which have been taken, either by the inventor or by other inventors,<sup>8</sup> and it is the common practice for the complainant to aver that his patent has been adjudicated elsewhere by some circuit court, if such is the fact.<sup>9</sup> A simple averment that the defendant has infringed, without specifying in what particulars, is sufficient.<sup>10</sup>

<sup>1</sup> Orendorff v. Tallman, 90 Ala. 441; s. c., 7 S. Rep. 821.

<sup>2</sup> Cole v. Savage, Clarke's Ch. 861.

<sup>3</sup> Judd v. Seaver, 8 Paige, 548.

<sup>4</sup> Brinckerhoff v. Lansing, 4 Johns. Ch. 66, 71.

<sup>5</sup> Beecher v. Beecher, 48 Conn. 557.

<sup>6</sup> Cavender v. Cavender, 114 U. S. (1885), 464. A complaint alleged that the plaintiff paid to a corporation and its promoters \$10,000, for which they agreed to give him an amount of capital stock and of money equal to whatever the original promoters received, and that defendants refused to give him anything except \$10,000 of said stock, and a document stating that he was entitled to \$10,000

of first mortgage bonds of another company. The complaint did not show what the amount was that the original promoters were to receive, or that they did in fact receive anything. It was held that the complaint did not state a cause of action, since no breach of the contract was shown. De Lacy v. Walcott (Super. N. Y.), 21 N. Y. Supl. 619.

<sup>7</sup> Steam-gauge & Lantern Co. v. McRoberts, 26 Fed. Rep. 765.

<sup>8</sup> Steam-gauge & Lantern Co. v. McRoberts, 26 Fed. Rep. 765.

<sup>9</sup> American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. Rep. 80.

<sup>10</sup> American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. Rep. 303, where

§ 98. The same subject further illustrated.— A pleading is sufficient which sets forth documents according to their tenor or legal effect and avers the substantive facts relied on as a cause of action or defense.<sup>1</sup> If a party avers that he holds title to anything by a certain instrument, which he annexes, and that instrument both grants the title and describes the full extent of the rights conferred, it is equivalent to an averment that he has title to all the rights specifically described in such instrument.<sup>2</sup> Generally the bill ought not to set forth

the court said it was difficult to sustain the rule on principle, but the weight of authority was decisive.

<sup>1</sup> Edison Electric L. B. v. United States Electric L. Co., 85 Fed. Rep., 184, 187. A bill which does not set forth a copy of an instrument vital to complainant's claim, or aver its terms, is demurrable. Marshall v. Turnbull, 84 Fed. Rep. 827. A bill to enjoin the infringement of a patent therein described merely as an "improvement in cable railways," without making the patent or specifications exhibits, is demurrable for want of certainty. Wise v. Grand Ave. R. Co., 38 Fed. Rep. 277, 278. A bill which describes an invention as "a new and useful improvement in thermo-electric batteries," fully described in letters patent thereafter mentioned, and then refers to the letters patent by their date only, without giving the number, and without referring to any record in the patent office, by book and page, does not describe the invention with sufficient particularity; and the fact that the letters patent were filed on a motion for preliminary injunction, and are before the court, will not cure the defect, since they are not a part of the record. Electrolibration Co. v. Jackson, 52 Fed. Rep. 773. A bill to restrain the infringement of a patent must either set out the patent or attach it as an exhibit or give a

substantial description of the invention. Stirrat v. Excelsior Mfg. Co., 44 Fed. Rep. 142. A bill for the cancellation of a deed is not bad on demurrer because it alleges that the deed was executed to complainant, it being apparent that defendant was intended; especially where a copy of the deed was attached as a part of the bill, whereby the error was cured. Piedmont Land & Imp. Co. v. Piedmont Foundry & Machine Co. (Ala.), 11 So. Rep. 832. In an action to foreclose building association mortgages given to secure several notes, by the express terms of which the constitution and by-laws were made a part of each note, it was sufficient, where copies of each note and of the by-laws were filed with the complaint, to refer thereto in such complaint simply as the note; each note, together with the constitution and by-laws, constituting one instrument. Hatfield v. Hun (Ind.), 81 N. E. Rep. 532.

<sup>2</sup> American Bell Tel. Co. v. Southern Tel. Co., 84 Fed. Rep. 803. It was there said that "The weight of authority is that the profer of any recorded instrument is equivalent to annexing a copy." Bogart v. Hinds, 25 Fed. Rep. 484, and cases cited; Post v. Hardware Co., 26 Fed. Rep. 618. But a statement in the bill that the plaintiff prays liberty to refer to the files and records of another suit.

deeds *in hæc verba*, but so much of them only as is material to the point in question.<sup>1</sup>

§ 99. **Relief secundum allegata et probata.**—No facts are properly in issue unless charged in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleading and evidence; for the court pronounces its decree *secundum allegata et probata*.<sup>2</sup> A party can no more succeed upon a case proved but not alleged

in that court, to show such and such things, was held in *Pacific R. Co. v. Missouri Pacific Ry. Co.*, 111 U. S. 505, not to make such records a part of the bill.

<sup>1</sup> *Hood v. Inman*, 4 Johns. Ch. 437; *Nix v. Winter*, 35 Ala. 309; *Duckworth v. Duckworth*, 35 Ala. 70; *Camden &c. R. Co. v. Stewart*, 19 N. J. Eq. 343, 347; Equity Rule 26 of the United States Supreme Court; Rule 4 of Chancery in New Hampshire, 38 N. H. 606.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 257; *Anderson v. Northrop* (Fla.), 12 So. Rep. 318; *Glascott v. Lang*, 2 Phil. Ch. 310; *Hoyt v. Hoyt*, 27 N. J. Eq. 399; *Simms v. Guthrie*, 9 Cranch, 19; *Eyre v. Potter*, 15 How. 42; *Stucky v. Stucky*, 30 N. J. Eq. 546, 554; *Hart v. Stribling*, 21 Fla. 136; *Grosholz v. Newman*, 21 Wall. 431; *Brainerd v. Arnold*, 27 Conn. 617; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788; *Marshman v. Conklin*, 21 N. J. Eq. 546; *Armstrong v. Ross*, 20 N. J. Eq. 110; *Vansciver v. Bryan*, 13 N. J. Eq. 434; *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180; *Wilson v. Cobb*, 28 N. J. Eq. 177, and *Smith v. Axtell*, 1 N. J. Eq. 494, where it is said the parties are confined to the issues as much as in a court of law; *Triggs v. Jones* (Minn.), 48 N. W. Rep. 1113; *Pasman v. Montague*, 30 N. J. Eq. 385; *Skinner v. Bailey*, 7 Conn. 497; *Andrew v. Farnham*, 10 N. J. Eq.

91; *Plume v. Small*, 5 N. J. Eq. 460; *Hopper v. Sisco*, 5 N. J. Eq. 343; *Hoffman v. McMorran*, 52 Mich. 318; *Henry v. Suttle*, 42 Fed. Rep. 91; *Mott v. Mott*, 49 N. J. Eq. 192, 195; *Barteau v. Barteau* (Minn.), 47 N. W. Rep. 645; *Parsons v. Heston*, 11 N. J. Eq. 155; *Watkins v. Milligan*, 37 N. J. Eq. 435; *Hart v. Schenck*, 32 N. J. Eq. 143, 154. The complainant must obtain leave to amend, or fail. *Midner v. Midner*, 26 N. J. Eq. 299; *Gorham v. Farson*, 119 Ill. 425; *Hagar v. Whitmore*, 82 Me. 248; s. c., 19 Atl. Rep. 444. The prayer for general relief will not save him. *Francis v. Bertrand*, 26 N. J. Eq. 213; *Walker v. Hill*, 21 N. J. Eq. 191. Where complainant's bill by mistake disclaims title to a lot of land, the court will not on a prayer for general relief, without any amendment, there having been ample time to amend after the error was discovered, allow complainant to recover such lot. *Hickson v. Bryan*, 80 Ga. 314; s. c., 5 S. E. Rep. 495. Public Statutes of Rhode Island, chapter 192, section 22, providing that "no suit in equity shall be defeated on the ground that a mere declaratory decree is sought, and the court may make binding declarations of right in equity without granting consequential relief," cannot be held to authorize a declaratory decree in any suit unless a case is stated in the bill which shows a right to actual re-

than upon a case alleged but not proved.<sup>1</sup> Nor can any admissions in an answer, under any circumstances, lay the foundation for relief under any specific head of equity unless it be substantially set forth in the bill.<sup>2</sup> "It is an established doctrine of this court," said Vice-Chancellor Van Fleet, "that where the bill sets up a case of actual fraud, and makes that the ground for the prayer for relief, the complainant is not in general entitled to a decree by establishing some one or more of the facts, quite independent of fraud, which might of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated."<sup>3</sup>

§ 100. The same subject continued.— But the rule that the proof and the pleading must correspond is to be applied equitably and not rigidly, especially when it is appealed to on behalf of a party having all the time of the progress of the cause the facts in full possession, and therefore not misled by a pleading which, although inaccurate or mistaken as to some of the details, yet contains averments sufficient to support a claim for the relief prayed for.<sup>4</sup> "It is undoubtedly a well-

lief, either immediate or prospective, against the defendants. *Hanley v. Wetmore*, 15 R. L. 886; s. c., 6 Atl. Rep. 777. Where a bill was filed to set aside an administrator's sale on the ground of actual fraud and collusion, and the proof showed that it should be set aside, not for collusion, but because it was in fact purchased for the administrator himself, the complainant was held not entitled to relief, the case proved not being the one made by the bill nor within the issue made by the parties. *Howell v. Sebring*, 14 N. J. Eq. 84. See, also, on this point, *Doggett v. Simms*, 79 Ga. 253; s. c., 4 S. E. Rep. 909. A bill sought to establish a trust by virtue of an express agreement. The evidence was of a purely resulting trust, in an entirely different person. It was held that the variance was fatal. *Midner v. Midner*, 27 N. J. Eq.

548. It was error to decree a petitioner relief as a second mortgagee upon an allegation that he was the holder of the equity of redemption. *Stevens v. Church*, 41 Conn. 370.

<sup>1</sup> *Phelps v. Elliott*, 85 Fed. Rep. 455, 461; *Foster v. Goddard*, 1 Black. 518; *Boone v. Chiles*, 10 Pet. 177; *Carneal v. Banks*, 10 Wheat. 181.

<sup>2</sup> *Jackson v. Ashton*, 11 Pet. 229; *Knox v. Smith*, 4 How. 298.

<sup>3</sup> *Hoyt v. Hoyt* (1876), 27 N. J. Eq. 399, 402, citing *Montesquieu v. Sandys*, 18 Ves. 302. Cf. *Reed v. Cramer*, 2 N. J. Eq. 277.

<sup>4</sup> *Crawford v. Moore*, 28 Fed. Rep. 824, 827; affirmed in *Moore v. Crawford*, 180 U. S. 122, 142. In *Texas v. Hardenberg*, 10 Wall. 68, it was asserted on behalf of the defendant that upon the bill, which was for an injunction to restrain the defendant from asking payment of certain

settled rule in equity that the decree must conform to the bill, and be warranted by it both in the relief and in the grounds of relief. Relief not embraced in the prayer of the bill cannot be decreed, nor can the relief asked for be granted upon grounds not disclosed by the bill. It is, however, no objection that the relief established by the proof is broader and stronger than that stated in the bill, or that grounds of relief not contained in the bill are established in evidence, provided the decree is warranted by the charges and prayers of the bill, and the bill sustained by the evidence.”<sup>1</sup>

**§ 101. Jurisdictional averments.**—The facts requisite to show that the court has jurisdiction of the suit must be directly averred in the bill.<sup>2</sup> But where the description in a mortgage annexed to and made part of the complaint, in a suit to foreclose, shows that the mortgaged premises were, at the time the suit was commenced, in a legal subdivision, which the court judicially knows to have been within the

bonds of the United States belonging to the complainant, but in the possession of the defendant, he could in no event be held to account for the proceeds of the bonds; the prayer of the bill being only for relief by injunction against receiving payment of the bonds or coupons, and by decree specifically for delivery of them to complainant. Chief Justice Chase in his opinion said it was plain enough that the principal object of the bill was to prevent the collection of the bonds by the defendants, and to compel the surrender of them to the State of Texas; but that there were averments and interrogatories looking to the proceeds as well as to the bonds themselves. Admitting that the allegations and interrogatories did not assert the right of the complainant to the proceeds with absolute directness and distinctness, he added:—“The bill might have been better drawn; but we think it would savor of extreme technicality to refuse to see in the bill enough, in

relation to the proceeds of the bonds, to warrant relief in this respect under the general prayer.”

<sup>1</sup> *Ryerson v. Adams*, 6 N. J. Eq. 618. See, also, *Thornton v. Ogden*, 82 N. J. Eq. 728. Where a bill for foreclosure of a lien alleged that the contract arose under a contract of a certain date, proof of the same contract at a different date is an immaterial variance. *Kiel v. Carll*, 51 Conn. 440. Under Code of Maryland, article 5, section 84, which provides that on appeal in equity no objection to the admissibility of evidence or the sufficiency of the bill shall be made in the court of appeals unless the record shows that such objection was made by exceptions filed in the court below, the court of appeals will decree according to the evidence in the record, whether covered by the averments of the bill or not. *Schroeder v. Loeber* (Md.), 24 Atl. Rep. 226.

<sup>2</sup> *Griswold v. Mather*, 5 Conn. 435.

boundaries of the county in which the suit was brought, it cannot be objected that the complaint does not show that the premises were so situated.<sup>1</sup> Under code provisions abolishing forms of actions, and providing that the complaint shall state the facts constituting the cause of action in ordinary and concise language, both legal and equitable relief may be granted in the same action, and it is not necessary, in order to obtain equitable relief, to allege that plaintiff has no adequate remedy at law.<sup>2</sup> In an action to subject defendant's undivided interest in land as heir to the satisfaction of a judgment against him, execution on which had been returned unsatisfied, though the petition does not formally allege that the land in question is within the county where the suit is brought, yet that fact sufficiently appears by an allegation that such land had been allotted as dower to a widow by an agreement between herself and her husband's heirs, of whom defendant was one, that such agreement, describing the land, had been recorded in the county clerk's office of the county in which the action was brought, and by annexing a copy of such agreement as an exhibit to the petition.<sup>3</sup>

§ 102. The same subject continued.—In New Jersey the chancellor, upon the application of a creditor or stockholder of a corporation alleging that it has become insolvent and will not be able to resume business in a short time with safety to the public and advantage to its stockholders, is empowered by statute to proceed in a summary manner to inquire into the truth of the allegations, and if they be established he may enjoin it from the further exercise of its franchise, appoint a receiver, etc. In describing what averments the bill should contain it was declared not sufficient to allege that the corporation had become insolvent and had suspended its business for want of funds, but that the facts and circumstances which prove insolvency must be set out, and that those facts must be clearly established by the proofs. “The proof in support of a jurisdictional fact must always be clear and convincing,” said

<sup>1</sup> *Scott v. Sells*, 88 Cal. 599; s. c., 26 Pac. Rep. 850.

<sup>2</sup> *Bryant v. Bryant* (Ky.), 20 S. W. Rep. 270.

<sup>3</sup> *Ely v. New Mexico &c. R. R. Co.*, 129 U. S. 291; s. c., 9 S. Ct. Rep. 298.



Vice-Chancellor Van Fleet, "for the court derives its power from the fact, and hence until the fact is shown to exist it has no power. To doubt in such a case is to deny."<sup>1</sup>

**§ 103. Jurisdictional averments in the federal courts.—** "It was settled at a very early day that the facts on which the jurisdiction of the circuit courts rests must in some form appear on the face of the record of all suits prosecuted before them."<sup>2</sup> The presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. In cases where jurisdiction depends on citizenship of the parties, such citizenship or the facts which in legal intendment constitute it should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record.<sup>3</sup> The Supreme Court will

<sup>1</sup> *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402. See, also, *Rawnsley v. Trenton Life Ins. Co.*, 9 N. J. Eq. 25; *Oakley v. Paterson Bank*, 2 N. J. Eq. 178, 176; *Parsons v. Monroe Mfg. Co.*, 4 N. J. Eq. 187, 206; *Brumdred v. Paterson Machine Co.*, 4 N. J. Eq. 294, 305; *Goodheart v. Raritan Min. Co.*, 8 N. J. Eq. 73, 77; *Newfoundland Railroad Construction Co. v. Schack*, 40 N. J. Eq. 222, 226.

<sup>2</sup> *Continental Ins. Co. v. Rhoads*, 119 U. S. 287; *Johnson v. Christian*, 125 U. S. 642, 644; *Turner v. Bank of North America*, 4 Dall. 8; *Bushnell v. Kennedy*, 9 Wall. 387; *Hornthall v. Collector*, 9 Wall. 560; *Ex parte Smith*, 94 U. S. 455; *Robertson v. Cease*, 97 U. S. 646; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283; *Bors v. Preston*, 111 U. S. 252, 255; *Mansfield &c. Ry. Co. v. Swan*, 111 U. S. 879, 882; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 558; *Hancock v. Holbrook*, 112 U. S. 229; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450. And it is error for a court to proceed without its jurisdiction is shown. *Continental Ins. Co.*

*v. Rhoads*, *supra*; *Grace v. American Central Ins. Co.*, *supra*; *Mansfield &c. Ry. Co. v. Swan*, *supra*. See, also, § 24 (at p. 88), note 1, and § 25, *supra*.

<sup>3</sup> *Robertson v. Cease*, 97 U. S. 646, 649, where it was held that an allegation of "residence" is not equivalent to an averment (see, also, *Pacific Postal Tel. Co. v. Irvine*, 49 Fed. Rep. 118) of citizenship, and that the ruling in *Railway Company v. Ramsey*, 22 Wall. 322, approved in *Briges v. Sperry*, 95 U. S. 401, that such citizenship need not necessarily be averred in the pleadings, if it otherwise affirmatively appears by the record, does not apply to papers copied into the transcript which do not make a part of the record by bill of exceptions, or by an order of the court referring to them, or by some other mode recognized by law. Equity Rule 20 of the United States Supreme Court provides that "every bill in the introductory part thereof shall contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought."



take notice for itself of the absence of the averment of the necessary facts to show the jurisdiction of the circuit court.<sup>1</sup>

§ 104. **The same subject continued.**—So where the jurisdiction depends upon the alienage of one of the parties,<sup>2</sup> or upon the amount in dispute,<sup>3</sup> the facts must appear affirmatively on the face of the bill. And where a suit is brought by an assignee of a contract within the statute excluding jurisdiction unless the assignor could have maintained the suit, etc., it is well settled that the capacity of the assignor must be averred.<sup>4</sup> An allegation in a bill “that this suit is brought in good faith, and for the collection of and to compel the collection of what your orator believed to be a meritorious claim,” is not a sufficient compliance with Equity Rule 94 of the United States Supreme Court, which requires, in certain suits by a stockholder of a corporation against the corporation and others, an allegation that “the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.”<sup>5</sup> But although the jurisdiction be not alleged in the proceedings, as if the fact of diverse citizenship do not appear, a decree in the case while it remains unreversed is conclusive between parties and privies.<sup>6</sup>

<sup>1</sup> *Johnson v. Christian*, 125 U. S. 642, 644. A bill may be dismissed by the court on its own motion where the proper allegations as to citizenship of the parties are not contained in the introductory part, and are not pointed out by counsel elsewhere in the bill, or where the prayer for subpoena does not contain the names of the defendants as required by the rules. *City of Carlsbad v. Tibbetts*, 51 Fed. Rep. 852. Although diverse citizenship of the parties should be covered in proper averments, the fact that it appears in the summons forming a part of the record is sufficient when the question is first raised in the Supreme Court. *Gordon v. Third Nat. Bank*, 144 U. S. 97; s. c., 12 S. Ct. Rep. 657.

<sup>2</sup> *Robertson v. Cease*, 97 U. S. 646, 649. Where the Supreme Court rendered a decree dismissing a bill for want of an allegation of citizenship, a petition for reconsideration was filed later in the term, and the court, upon closer inspection of the record, discovered it to be a case where no such allegation was necessary and vacated its former decree. *Johnson v. Christian*, 125 U. S. 642.

<sup>3</sup> *Rich v. Bray*, 87 Fed. Rep. 273.

<sup>4</sup> *Corbin v. County of Blackhawk*, 105 U. S. 659, 667; *Turner v. Bank of North America*, 4 Dall. 8; *Mollan v. Torrance*, 9 Wheat. 587; *Bank of United States v. Moss*, 6 How. 81; *Bradley v. Rhines*, 8 Wall. 398.

<sup>5</sup> *Quincy v. Steel*, 120 U. S. 241.

<sup>6</sup> *McCormick v. Sullivant*, 10 Wheat.

§ 105. **Allegations of parties' interests.**— A bill is demurrable which fails to show that the complainant has an interest in the subject-matter, and title to sue concerning it.<sup>1</sup> The bill should show the relation borne by the plaintiffs to the subject-matter,—as, for instance, where they claim as heirs of devisees of a certain person, the relation of each to that person should be set forth.<sup>2</sup> Where plaintiffs described themselves as citizens and tax-payers of a city and sought relief from threatened injury to their interests as such, they were not entitled to relief by virtue of their interest as citizens and tax-payers of the county.<sup>3</sup> A decree founded on a bill which shows no right of action in complainant against defendant in respect to the subject-matter of the suit is a nullity, and will be so treated, even in a collateral proceeding.<sup>4</sup> The bill must also show by sufficient averments that the defendant has an interest in the subject-matter, and is liable to answer to the complainant therefor.<sup>5</sup>

192, where it is said that the inferior courts of the United States, although of limited jurisdiction, are not inferior in the technical sense of the term. See, also, *Kempe's Lessee v. Kennedy*, 5 Cranch, 185; *Skillern's Ex'r v. May's Ex'r*, 6 Cranch, 267.

<sup>1</sup> *Carter v. Carter*, 82 Va. 624; *Story's Equity Pleading* (10th ed.), § 260.

<sup>2</sup> *Norris v. Lemen*, 28 West Va. 336.

<sup>3</sup> *Whitney v. City of New Haven*, 58 Conn. 451. The attorney-general of the United States has no power to maintain in his own name, "as he is the attorney-general of the United States," a bill in equity to repeal letters patent for an invention. *Attorney-General v. Rumford Chemical Works*, 82 Fed. Rep. 608. Under the Connecticut Practice Act of 1879, all objection to the capacity or right of the plaintiff to sue is waived if the question is not raised by the answer, and the case goes to trial on its merits. *Merwin v. Richardson*, 52 Conn. 224.

<sup>4</sup> *Consolidated Electric Storage Co. v. Atlantic Trust Co.* (N. J. Ch.), 24 Atl. Rep. 229.

<sup>5</sup> *Story's Equity Pleading* (10th ed.), § 262. A bill filed against a township and its treasurer to restrain the collection of a drain tax assessed for the construction of a drain in the township, which prays that the "so-called drain tax upon the said land may be declared to be null and void, and that said . . . treasurer of the township of Walker may be enjoined . . . from collecting said drain taxes, and from returning the same to the county treasurer of said county; and for such other and further relief in the premises as shall be agreeable to equity;" and that process may issue against the township treasurer and the township,—is demurrable for want of equity, in that there is no allegation showing that the township is interested in the proceeding. *Emerson v. Walker Tp.*, 68 Mich. 483; s. c., 80 N. W. Rep. 92. One of the essential qualifications of

**§ 106. Allegations in excuse for laches.**— A complainant who is prosecuting a stale demand should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim,<sup>1</sup> “how he came to be so long ignorant of his rights and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or a formal plea of the statute of limitations in his answer.”<sup>2</sup>

**§ 107. Allegations of fraud.**— A bill for relief on the ground of fraud must be specific in its statement of the facts that constitute the fraud alleged.<sup>3</sup> “Mere words in and of

a bill in chancery is that it should, either in the caption or in the body of the bill, name some person or persons as parties defendant, and describe them as having some interest in the subject-matter of the suit, and these requisites are as essential to a bill of review as to an original bill, and without them a paper purporting to be a bill of review should be dismissed on demurrer, or stricken from the files on motion. *Kanawha Valley Bank v. Wilson*, 35 West Va. 36; s. c., 13 S. E. Rep. 58.

<sup>1</sup> *Marsh v. Whitmore*, 21 Wall. 178.

<sup>2</sup> *Badger v. Badger*, 2 Wall. 95; *Richards v. Mackall*, 124 U. S. 188; *Stearns v. Page*, 7 How. 819; *Godden v. Kimmell*, 99 U. S. 201. “Where the suit is one which would be barred by presumption [lapse of time] but for explanations or excuses, the complainant is bound to state in his bill the facts or circumstances on which he relies to repel the presumption.” *Olden v. Hubbard* (1881), 84 N. J. Eq. 85, 87. Where the allegations of a bill show that complainant’s claim is barred by his laches, relief cannot be granted thereon whatever the evidence may be. *Walker v. Ray*, 111 Ill. 815. It seems that an allegation

in the bill in excuse for gross laches of negotiations from time to time between plaintiff and defendant, and that plaintiff hoped for a settlement, should state that defendant gave encouragement to such hope. *Mackall v. Casilear*, 187 U. S. 556, 567.

<sup>3</sup> *Horsford v. Gudger*, 85 Fed. Rep. 888; *Patton v. Taylor*, 7 How. 182; *Moore v. Hawkins*, 19 How. 69; *Gates v. Steele*, 58 Conn. 816; *Knox County v. Harshman*, 183 U. S. 156; *Carr v. Fife*, 44 Fed. Rep. 718. It is well settled law that affirmative relief will not be granted in equity upon the ground of fraud unless it is made a distinct allegation in the bill, so that it may be put in issue by the pleadings. *Noonan v. Lee*, 2 Black. 508; *Moore v. Green*, 19 How. 69; *Beaubien v. Beaubien*, 28 How. 190; *Magniac v. Thompson*, 15 How. 281; *Eyre v. Potter*, 15 How. 42; *Fisher v. Boody*, 1 Curt. 206; *Voorhees v. Bonesteel*, 16 Wall. 16; *Bergan v. Porpoise Fishing Co.*, 42 N. J. Eq. 397, 402; *Stover v. Reading*, 29 N. J. Eq. 158; *Jewett v. Dringer*, 27 N. J. Eq. 271; *Small v. Boudinot*, 9 N. J. Eq. 881; *State v. Williams*, 89 Kan. 517; s. c., 18 Pac. Rep. 737; *Nichols v. Rogers*, 139 Mass. 146; *State v.*

themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction unless the transactions to which they refer are such as in their essential nature constitute a fraud or breach of trust, for which a court of chancery can give relief.”<sup>1</sup> The defendant should not be subjected to being taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness.<sup>2</sup> In a bill to set aside a decree on the ground of fraud, it will not suffice to charge generally that it was fraudulently procured or that the court was imposed upon. A state of facts must be disclosed by the bill from which the court can see that the conclusions stated by the pleader to the effect that the judgment was fraudulently procured, etc., are properly drawn.<sup>3</sup>

§ 108. The same subject continued.— “It is a mistake to suppose that in stating the facts which constitute a fraud, where relief is sought in a bill in equity, *all* the evidence

Turner, 49 Ark. 311; s. c., 5 S. W. Rep. 302; McKaw v. Ordway, 76 Ala. 247; Wetherly v. Strauss, 98 Cal. 283; s. c., 28 Pac. Rep. 1045; Threlkel v. Scott, 89 Cal. 351; s. c., 26 Pac. Rep. 879; Bull v. Bull, 2 Root, 479; McMahon v. Rooner (Mich.), 58 N. W. Rep. 589. The defendant is entitled to a full opportunity to disprove the facts charged. Smith v. Wood, 42 N. J. Eq. 563, 567.

<sup>1</sup> Van Weel v. Winston, 115 U. S. 228, 237; Ambler v. Choteau, 107 U. S. 586, 591; St. Louis & Ry. Co. v. Johnston, 133 U. S. 577.

<sup>2</sup> St. Louis & Ry. Co. v. Johnston, 133 U. S. 577. When the plaintiff in equity seeks relief from the effects or results of some fraud, accident or mistake, he should in his bill fully and explicitly state the circumstances, so as to present a clear picture of the particulars, or how the fraud was committed, and how the plaintiff was misled; of the character and causes of the accident or mistake and how it occurred. Merrill v. Washburn, 83 Me. 189; s. c., 22 Atl.

Rep. 118. If the allegation is insufficient, of course a demurrer does not confess the fraud. Penny v. Jackson, 85 Ala. 67; s. c., 4 So. Rep. 720. A bill to set aside or annul a patent of the United States for public land on account of fraud or mistake should set out by distinct averments the particulars of the fraud, the names of the parties engaged in it and of the officers imposed on, and the manner in which the mistake occurred. United States v. Atherton, 102 U. S. 372. See, also, Moore v. Hawkins, 19 How. 69. An averment that decedent, at a time when he was “very feeble both in mind and body, was persuaded and induced, through some undue and improper influence unknown to complainants, to execute” a certain deed, is entirely insufficient, in that it does not state the facts constituting such influence. Jackson v. Rowell, 87 Ala. 685; s. c., 6 So. Rep. 95.

<sup>3</sup> United States v. Norsch, 42 Fed. Rep. 417.

which may be adduced to prove that fraud must be recited in the bill. It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired shall be fairly stated so as to put the defendant upon his guard and apprise him of what answer may be required of him.”<sup>1</sup> And an imperfect averment, if it is to be the subject of exception, must, in the main, be brought to the notice of the court by a demurrer. It is but seldom, and only when the statement is so vague and loose as to be utterly inert and inefficient, that it can be objected to at the final hearing. The general rule is that the court will not listen to such objections at the hear-

<sup>1</sup> Per Justice Miller in *United States v. Bell Telephone Co.*, 128 U. S. 816. A bill brought by the guardian of a lunatic to have a deed executed by her to her son set aside, which charges that defendant fraudulently procured the deed from his mother either while she was *non compos*, or when her mind was deranged or unsound or weak, or by undue influence exerted by him over her, describes with sufficient particularity the acts relied on as invalidating the deed, since the charge that he fraudulently procured the deed is specifically set forth, and the guardian could not have knowledge of the peculiar and special phase of fraud adopted. *Mott v. Mott* (N. J. Ch.), 22 Atl. Rep. 997. A complaint for the reconveyance of real estate, which alleges that defendant, while acting as plaintiff's agent, proposed that she convey all her real estate to him for the purpose of managing the same, promising to reconvey on demand; that she was induced by his representations and promises to make the conveyances, and that at the time of making the promises he had no intention of performing them, but made them with the fraudulent purpose of inducing her to put the property in his hands that he might cheat and defraud her, sufficiently sets out the

facts which constitute the alleged fraud. *Alaniz v. Casenave*, 91 Cal. 41; s. c., 27 Pac. Rep. 521. For other cases where the allegations were held to be sufficient, see *Peck v. Vinson*, 124 Ind. 121; s. c., 24 N. E. Rep. 726; *Beethoven Piano Organ Co. v. C. C. McEwen Co.*, 12 N. Y. Supl. 552; *Tyler v. Savage*, 148 U. S. 79; s. c., 12 S. Ct. Rep. 340; *Lawrence v. Gayetty*, 78 Cal. 126; s. c., 20 Pac. Rep. 382; *Gibson v. Trowbridge Furniture Co. (Ala.)*, 9 So. Rep. 370; *United States v. Bell Telephone Co.*, 128 U. S. 816. “The rule of certainty in pleadings in equity does not require that the facts and circumstances shall be minutely alleged. General averments of facts from which, unexplained, a conclusion of fraud arises, are sufficient.” *Burford v. Steele*, 80 Ala. 147; *Pickett v. Pipkin*, 64 Ala. 520. In a bill against the officers of a bank for gross misconduct in managing its affairs, whereby it was ruined, particular instances of official misfeasance and carelessness, which standing alone might not fix personal liability, are sufficient, when connected with general allegations of official misconduct and culpable negligence, to sustain it on general demurrer. *Ackerman v. Halsey*, 87 N. J. Eq. 356; s. c. on appeal, 38 N. J. Eq. 501.

ing of the case if the matters stated are such that the court can properly proceed to a decree.<sup>1</sup>

§ 109. Scandal and impertinence.— Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; to which may be added that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous.<sup>2</sup> “All matters not material to the suit, or, if material, which are not in issue, or which, if both material and in issue, are set forth with great and unnecessary prolixity, constitute impertinence.”<sup>3</sup> Matter which is scandalous is also impertinent, but a bill may contain matter which is impertinent without being scandalous.<sup>4</sup> A deposition taken in another suit between the same parties, and annexed to the bill by way of schedule, is incompetent, and therefore impertinent, when it is not shown by competent evidence that there was a suit pending in which it was taken, and no certified or sworn copy of the original is produced.<sup>5</sup> Recitals from a bill filed by the defendant in another suit, which might involve contradictions impairing his credibility as a witness, and which, if admitted by the answer, would have no tendency to establish the complainant’s claim to the relief sought in his bill, are impertinent. So, also, are recitals of deeds at length, *in hæc verba*, unless

<sup>1</sup> Rorback v. Dorsheimer, 29 N. J. Eq. 516, 518; Mason v. Daly, 117 Mass. 408.

<sup>2</sup> 1 Daniell’s Ch. Pr. (5th ed.) 847; *Ex parte* Simpson, 15 Ves. 476; Hood v. Inman, 4 Johns. Ch. 487; Christie v. Christie, L. R. 8 Ch. App. 499; Campbell v. Taul, 8 Yerg. (Tenn.) 564. Immaterial allegations which are reproachful are scandalous. Woods v. Morrell, 1 Johns. Ch. 108.

<sup>3</sup> Camden &c. R. Co. v. Stewart (1868), 19 N. J. Eq. 845. See, also, Slack v. Evans, 1 Price, 278, note; Allfrey v. Allfrey, 14 Beav. 285; Gompertz v. Best, 1 Y. & C. Ex. 114, 117. “The best test by which to as-

certain whether the matter be pertinent is to try whether the subject-matter of the allegation could be put in issue and would be matter proper to be given in evidence between the parties.” Per Chancellor Kent in Woods v. Morrell, 1 Johns. Ch. 108. See, also, Mrzena v. Brucker, 8 Tenn. Ch. 161; Wood v. Mann, 1 Sumn. 578; Chapman v. School Dist., Deady, 108; Spaulding v. Farwell, 62 Me. 319.

<sup>4</sup> McIntyre v. Trustees &c., 6 Paige, 239.

<sup>5</sup> Camden &c. R. Co. v. Stewart, 19 N. J. Eq. 845.



necessary for some special purpose appearing on the face of the pleadings.<sup>1</sup> The court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be especially clear that it is such as ought to be struck out of the record, for the reason that the error, on the one side, is irremediable; on the other, not.<sup>2</sup>

**§ 110. The same subject continued.**— A repetition of the same allegations in different parts of a bill or answer renders either one or the other of such allegations impertinent.<sup>3</sup> If the alleged objectionable parts of a bill have a tendency, or would be admissible in evidence, to show the truth of any allegation in the bill that is material with reference to the relief prayed, they will not be stricken out.<sup>4</sup> A bill to charge the managers of a savings bank with a loss resulting from an illegal loan of the bank's securities by a portion of the managers, is not open to the objection that it contains impertinent or scandalous matter because it shows the condition of the bank and the unlawful management of it prior to the time when the act was committed from which the loss resulted.<sup>5</sup>

<sup>1</sup> Camden &c. R. Co. v. Stewart, 19 N. J. Eq. 348.

<sup>2</sup> Dodd v. Wilkinson, 42 N. J. Eq. 647; Davis v. Cripps, 2 Y. & Coll. 448; Tucker v. Cheshire R. Co., 1 Foster (N. H.), 88. By United States Equity Rule 26 "every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit."

<sup>3</sup> Norton v. Woods, 5 Paige, 260.

<sup>4</sup> Kirkpatrick v. Corning, 40 N. J. Eq. 241; Gleaves v. Morrow, 21 Eng. Ch. 592; Goodrich v. Rooney, 1 Minn. 195; Fisher v. Owen, 8 Ch. D. 645, 658. A few unnecessary words do not render a bill impertinent unless they embarrass the defendant in answering the bill. Hawley v. Wolverton, 5 Paige, 522. Matter may be

legitimate by having an effect on the costs. Desplaces v. Goris, 1 Edw. Ch. 350. The degree of the relevancy is not material. Gleaves v. Morrow, 2 Tenn. Ch. 596; Story's Equity Pleading (10th ed.), § 269. The case should be especially clear to warrant the expunging of matter from pleadings as impertinent, Finger v. City of Kingston, 9 N. Y. Supl. 175; but when the chancellor has struck out statements from a bill which are very prolix, and appear to be of but small importance to the case, the appellate court will not interfere with such order. Camden &c. R. Co. v. Stewart, 21 N. J. Eq. 484.

<sup>5</sup> Wilkinson v. Dodd, 42 N. J. Eq. 234; Dodd v. Wilkinson, 42 N. J. Eq. 647. "A bill in chancery, like a declaration at law, should confine its statements to such facts as are proper to show that the complainant is entitled to relief, and which if proved



In a bill by a *cestui que trust* for the removal of the trustee it is not scandalous or impertinent to impute to the trustee corrupt and improper motives.<sup>1</sup>

**§ 111. Objections for scandal and impertinence.**—Neither scandal nor impertinence, however gross, is ground of demurrer.<sup>2</sup> By statute in England, and the orders in chancery upon the subject, mere impertinence cannot be excepted to or corrected in the progress of a suit, but the court must direct at the decree that all costs occasioned by it shall be paid by the party in fault.<sup>3</sup> In the United States circuit courts a bill “may, on exceptions, be referred to a master by any judge of the court for impertinence or scandal, and, if so found by him, the matter shall be expunged at the expense of the

will entitle him to relief, and should not set out the evidence, whether oral or written, by which the facts are to be proved. But one subject of relief, to which a complainant in equity is always entitled, and which he generally seeks, is a discovery of such facts material to his relief as are within the knowledge of the defendant. He is therefore entitled to set out such collateral facts and circumstances as would, if proved or admitted, support his case, or go to show that he is entitled to relief, for the very purpose of requiring an answer upon oath. Such statements would, without doubt, be impertinent in a bill which requires an answer without oath, and has no interrogatories annexed relating to them, as they are only pertinent for the purpose of discovery.” *Camden & Co. R. Co. v. Stewart* (1868), 19 N. J. Eq. 848, 846. See, also, *Hawley v. Wolverton*, 5 Paige, 522. Interrogatories in the bill seeking to compel respondents to make discovery, and annex copies of correspondence with persons not parties, for the purpose of developing the system by which they carried on the business of loaning money, are

improper, and should be stricken out. *Alexander v. Mortgage Co. of Scotland*, 47 Fed. Rep. 181.

<sup>1</sup> *Earl of Portsmouth v. Fellows*, 5 Mad. 450; 1 Daniell's Ch. Pr. (5th ed.), 848.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 849. See, also, *Machinery Co. v. Brown Folding Machine Co.*, 46 Fed. Rep. 72; *Stirrat v. Excelsior Mfg. Co.*, 44 Fed. Rep. 142; *Pacific Railroad v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 516, 522; *Parsons v. Johnson*, 84 Ala. 254; s. c., 4 So. Rep. 885.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 850; 15 and 16 Vic., ch. 86, § 17; Ord. XL, 11. “Before this change it was the practice to except to pleadings, interrogatories, depositions, affidavits and schedules, and to strike out unnecessary or irrelevant matter at the cost of the party in fault, or in some cases at the cost of the offending solicitor; and the courts have intimated that an examiner might be made to pay the costs occasioned by taking down the impertinent answers of a witness to interrogatories put by the examiner.” *Camden & Co. R. R. Co. v. Stewart*, 19 N. J. Eq. 848, 846.

plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference."<sup>1</sup> Exceptions must specify clearly what portion of the bill is objectionable.<sup>2</sup>

§ 112. The same subject continued.— Exceptions for impertinence cannot be taken after the defendant has answered or submitted to answer.<sup>3</sup> And if an exception be partly good and partly bad, it must be overruled *in toto*.<sup>4</sup> Where the defendant is in laches for not procuring the master's report, the

<sup>1</sup> United States Equity Rule 26. The rule to file exceptions also prevails in New Jersey. *Camden &c. R. Co. v. Stewart*, 19 N. J. Eq. 348. See *Kirkpatrick v. Corning*, 40 N. J. Eq. 241. And in Tennessee. Code, § 4401; *Johnson v. Tucker*, 2 Tenn. Ch. 244. And it was also the practice in the New York court of chancery when it existed. Under the code in that State the court may strike out scandalous or impertinent matter on motion. *Bowman v. Sheldon*, 5 Sand. 660; *Carpenter v. West*, 4 How. Pr. 58; *Mussina v. Clark*, 17 Abb. 188; *Opdyke v. Marble*, 18 Abb. 266, 875. The rule to file exceptions to a bill and refer them to a master is for the relief of the court. They may be heard directly by the chancellor at his option. *Camden &c. R. Co. v. Stewart*, 19 N. J. Eq. 348.

<sup>2</sup> *Whitmarsh v. Campbell*, 1 Paige, 645; *Franklin v. Keeler*, 4 Paige, 882; *Benedict v. Dake*, 6 How. Pr. 852; *Bryant v. Bryant*, 2 Rob. 612. United States Equity Rule 27 provides that "no order shall be made by any judge for referring any bill, answer or pleading, or other matter or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the

particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination."

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 270.

<sup>4</sup> *Wagstaff v. Bryan*, 1 R. & M. 80; *Tench v. Cheese*, 1 Beav. 571, 575; 1 *Daniell's Ch. Pr.* (5th ed.) 852; *Chapman v. School Dist.*, Deady, 108, 117. But see *Camden &c. R. Co. v. Stewart*, 19 N. J. Eq. 348, 350, where, on hearing of exceptions to a bill for impertinence, the costs occasioned to the defendant by the parts of the bill and schedule adjudged to be impertinent were ordered to be paid by the complainants. The exceptions having been sustained in part and overruled in part, neither party had costs from the other upon the exceptions.

proper remedy is by an order that he procure the report in a time stated or that the exceptions be dismissed.<sup>1</sup> A bill may be referred for scandal at any time<sup>2</sup> by any party to the cause;<sup>3</sup> as, for instance, a defendant who has not been served,<sup>4</sup> and even by leave of the court, upon the application of a stranger to the suit,<sup>5</sup> or the court may expunge such matter of its own motion.<sup>6</sup>

**§ 113. Inconsistent allegations.**—Where there are some allegations making out a case entitling the complainant to relief, and these allegations are contradicted by others in the same bill, it is demurrable.<sup>7</sup> Thus a bill in which the complainant seeks to amend and foreclose a mortgage given by a married woman, and, as alternative relief, prays that if foreclosure is denied the mortgagor's title may be decreed to be held in fraud of her husband's creditors, and the land subjected to sale as the property of her husband for the benefit of complainant as one of the creditors, is demurrable for repugnancy.<sup>8</sup> Land was conveyed under an agreement that, after the execution of a first mortgage, a second one should be given for the unpaid purchase-money. A claim having been filed for a mechanic's lien for labor and materials furnished the vendee, the vendor filed a bill to have the lien declared invalid, and, in the alternative, to have the first mortgage postponed to his claim to the extent of the lien, alleging that the first mortgagee and the vendee were responsible, through fraud and misrepresentations, for the existence of the lien in priority to the claim of the vendor. It was held

<sup>1</sup> Camden & C. R. Co. v. Stewart, 19 N. J. Eq. 848.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 854; Ellison v. Burgess, 2 P. Wms. 312, n.; Barnes v. Sarby, 3 Swanst. 232, n.; Booth v. Smith, 5 Sim. 689.

<sup>3</sup> Coffin v. Cooper, 6 Ves. 514.

<sup>4</sup> Fell v. Christ's College, Cambridge, 2 Bro. C. C. 279.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 851, 852; Williams v. Douglas, 5 Beav. 82, 85; s. c., 6 Jur. 379. See, also, Carpenter v. West, 4 How. Pr. 48.

<sup>6</sup> *Ex parte* Simpson, 15 Ves. 476;

Story's Equity Pleading (10th ed.), § 270.

<sup>7</sup> Bridger v. Thrasher, 22 Fla. 388. Failure of defendant to demur to a bill containing two directly opposite and repugnant allegations is a waiver of the defect, and relief should be granted if the proof shows that plaintiff is entitled to it under either aspect of the case. American Freehold Land Mortg. Co. v. Sewell (Ala.), 9 So. Rep. 148.

<sup>8</sup> Bynum v. Ewart (Tenn.), 18 S. W. Rep. 894.

that a bill resting on such inconsistent allegations could not be sustained, and should be dismissed as against the lien claimant.<sup>1</sup>

**§ 114. Bills with a double aspect.**—A bill with a double aspect may be filed where the complainant is in doubt whether he is legally entitled to one kind of relief or another upon the facts of the case as stated in the bill; in which case his prayer should be framed in the alternative, so that if the court decides against him as to one kind of relief prayed for, he may still obtain the proper relief under the other branch of his alternative prayer.<sup>2</sup> The alternative case stated must

<sup>1</sup>*Leonard v. Cook* (N. J.), 20 Atl. Rep. 1085. Deceased took out a life insurance policy in his own name, and assigned it to a minor child. Suit was brought to subject the proceeds of the policy to the payment of debts contracted by the assured. The bill alleged that under the policy the insurance was payable to a minor child of the assured. An amendment thereto, without purporting to correct the allegation, alleged that the policy was in the name of the assured, and was assigned by him to the child. It was held that the bill was demurrable for inconsistencies in the description of the policy. *Friedman v. Fennell* (Ala.), 10 So. Rep. 649. In an action to cancel a mortgage and the deed made on foreclosure thereof, the bill alleged that the debt had been paid before foreclosure, that the property had been bought in by the mortgagee, and that the mortgagors had no power to execute the mortgage. It was held that the bill was not bad on demurrer as being based on antagonistic rights, when the averment that the mortgagors had no power to execute the mortgage was erroneous. *Dickerson v. Winslow* (Ala.), 11 So. Rep. 918.

<sup>2</sup>*Lloyd v. Brewster*, 4 Paige, 537.

"It is a well-settled rule that the complainant, if not certain as to the specific relief to which he is entitled, may frame his bill in the alternative, so that if one kind of relief is denied another may be granted, the relief of each kind being consistent with the case made by the bill. *Terry v. Rosell*, 82 Ark. 492; *Colton v. Ross*, 2 Paige, 896; *Lingan v. Henderson*, 1 Bland, 252; *Murphy v. Clark*, 1 Sm. & M. 236." *Hardin v. Boyd*, 113 U. S. (1885), 756; *Maynard v. Tilden*, 28 Fed. Rep. 688, 704. "It is true that under the general prayer no relief can be granted which is distinct from and independent of that specially prayed for, except when the bill is filed in a double aspect. But it is certainly permissible for a complainant to aver in his bill that either one or the other of two alternative statements is true." *Fisher v. Moog*, 89 Fed. Rep. 665, 668. A bill in chancery is not multifarious simply because it contains a prayer for alternate relief inconsistent with its prayer for specific relief. *Korne v. Korne*, 30 West Va. 1; s. c., 8 S. E. Rep. 17. The Civil Code of Kentucky provides that a party must demand the specific relief he thinks he is entitled to, but there is no rule which forbids a prayer for specific relief in

be the foundation for the same relief. A bill for rescission of a contract cannot be joined with one for specific performance.<sup>1</sup> If the prayer for relief is in a double alternative and the complainants are entitled to either of the three kinds of relief thus asked for, the defendant cannot demur, but may at the hearing insist that the complainants be confined to such relief only as they may be entitled to under all the circumstances of the case as then presented.<sup>2</sup> Where the complainant prays for particular relief, *and* for other relief in addition thereto, he can have no relief inconsistent with such particular relief, although it should be founded on the bill.<sup>3</sup> Where the case made by the bill entitles the complainant to one of two kinds of relief, but not to both, the prayer should be in the disjunctive.<sup>4</sup>

**§ 115. Multifariousness generally.**—It is a rule in equity that two or more distinct subjects cannot be embraced in the same suit, and the offense against this rule is termed multifariousness.<sup>5</sup> “Multifariousness means the joining together improperly in one bill of complaint distinct and independent matters and thereby confounding them.”<sup>6</sup> It is almost universally declared that every case must be governed by its own circumstances, and that the question is left to the discretion of the court.<sup>7</sup> Multifariousness may consist of what is more properly termed misjoinder; that is, where all of the parties

the alternative. *Peck's Ex'r v. Price* (Ky.), 4 S. W. Rep. 806.

<sup>1</sup> *Shields v. Barrow*, 17 How. 180.

<sup>2</sup> *Western Ins. Co. v. Eagle Fire Ins. Co.*, 1 Paige, 284.

<sup>3</sup> *Colton v. Ross* (1881), 2 Paige, 896; *Wiltshire v. Marfleet*, 1 Edw. Ch. 654.

<sup>4</sup> *Colton v. Ross*, 2 Paige, 896.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 884.

<sup>6</sup> *Lehigh Zinc & Iron Co. v. N. J. Zinc & Iron Co.*, 48 Fed. Rep. 545, 548; *Story's Equity Pleading*, § 271; *Walker v. Powers*, 104 U. S. 245, where it was also said that “recent cases seem to show an increasing tendency to avoid the application of strict technical rules to a bill objected to as multifarious, and to deal

with the objection as addressed to the sound discretion of the court.”

<sup>7</sup> *Mills v. Hurd*, 82 Fed. Rep. 127; *Singer Mfg. Co. v. Springfield Foundry Co.*, 84 Fed. Rep. 393; *Gaines v. Chew*, 2 How. 619; *Clegg v. Varnell*, 18 Tex. 294; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282, 292; *Butler v. Spann*, 27 Miss. (Cush.) 234; *United States v. Courtner*, 26 Fed. Rep. 296; *Marshall v. Means*, 12 Ga. 61; *People v. Morrill*, 26 Cal. 336; *Kennebec &c. R. Co. v. Portland &c. R. Co.*, 52 Me. 178; *Warren v. Warren*, 56 Me. 368; *Abbot v. Johnson*, 82 N. H. 26; *Bartree v. Tompkins*, 4 Sneed, 623. In *Foster's Federal Practice* (2d ed.), § 75, the author says:—“The cases

are concerned in several transactions which form the subject-matter of the suit, but the court will not permit them to be litigated on one record; but the vice more commonly exists where it is attempted to bring two parties together who have no common interest in the litigation, whereby one party is compelled to join in the expense and trouble of a suit in which he and his co-defendant have no common interest, or in which one party is joined as complainant with another party with whom in like manner he either has no interest at all, or no such interest as requires the defendant to litigate it in the same action.<sup>1</sup> Courts have been much more tolerant of the first kind of multifariousness than of the second.<sup>2</sup>

show a tendency towards holding that multifariousness depends so much upon the discretion of the courts of first instance that a decision overruling an objection upon that ground would not be reviewed upon appeal (referring to *Gaines v. Chew*, 2 How. 619; *Oliver v. Piatt*, 8 How. 838; *Barney v. Latham*, 108 U. S. 205; *Sheldon v. Keokuk N. L. Packet Co.*, 8 Fed. Rep. 769; *Daniell's Ch. Pr.* 835, n. 2). In no case has the Supreme Court of the United States reversed a decree on account of multifariousness in the bill."

<sup>1</sup> *United States v. Bell Telephone Co.*, 128 U. S. 852; 2 *Daniell's Ch. Pr.* (5th ed.) 835; *Newland v. Rogers*, 8 Barb. Ch. 482.

<sup>2</sup> *Conover v. Sealy*, 45 N. J. Eq. 589, 592, where it is held to be a question of expediency; *Newland v. Rogers*, 8 Barb. Ch. 482. In England objections for misjoinder of complainants is abolished by 15 and 16 Vic., ch. 86, § 49, but not for misjoinder of subjects. So by the code of Tennessee, § 4827, distinct and unconnected matters may be united against one defendant. "An objection to a bill in equity for multifariousness is well taken when several plaintiffs, by one bill, demand several matters perfectly distinct and unconnected

against one defendant, or when one plaintiff demands several distinct and unconnected matters against several defendants. But where one general right is claimed by the bill, though the defendants have separate and distinct interests, the bill is not multifarious." *Mix v. Hotchkiss* (1840), 14 Conn. 82, 42. Where several grounds for relief are stated, but all arising out of the same series of transactions and relating to the same subject-matter, and they can be conveniently settled in one suit, the bill is not multifarious. *Rosenstein v. Burns*, 41 Fed. Rep. 841. In suits between the proper parties relating to the same subject-matter, several species of relief may be prayed, although each might be the subject of a separate suit. *Durling v. Hammar*, 20 N. J. Eq. 220. "The definition of multifariousness given by Lord Cottenham in *Campbell v. Mackay*, 1 Myl. & Cr. 608, has, I believe, been generally adopted as correct. He says it exists when a party is able to say he is brought as a defendant upon a record with a large portion of which, and of the case made by which, he has no concern whatever. but that it does not exist in a case where it appears that the complainants have common interest,



**§ 116. The same subject continued.**—“The objection of multifariousness raises merely a question of convenience in conducting the suit. It does not go to the merits of the complainant’s case and call upon the court to decide whether the complainant has a case against any of the defendants, but the court in dealing with it is simply called upon to exercise its discretion, and to decide whether both or all the causes of action set forth in the bill should be tried in a single suit, or should be split up and tried in two or more suits; or whether a defendant who is a necessary party in respect to one or more matters covered by the bill has a sufficient interest in or connection with the other matters involved in the suit to make him a proper party in respect to such other matters.”<sup>1</sup>

and the defendants are interested in all the different questions raised in the record, and the suit has a common object.” *Bolles v. Bolles*, 44 N. J. Eq. 885, 887.

<sup>1</sup> *Bolles v. Bolles*, 44 N. J. Eq. 885, 888. “No general rule defining what causes of action may be properly joined and what cannot can be laid down. The question is always one of convenience in conducting a suit, and not a principle, and is addressed to the sound discretion of the court. If it appears that the causes of action or claims are so dissimilar or distinct in their nature that they cannot be heard and determined together, but must be heard piecemeal — first one and then the other — a clear case of fatal misjoinder is presented; but where a complainant has two good causes of action, each furnishing the foundation of a separate suit, one the natural outgrowth of the other, or growing out of the same subject-matter, where all the defendants have some interest in every question raised on the record, and the suit has a single object, they may be properly joined, and the objection of multifariousness or misjoinder will not be sustained.” *Ferry v. Lai-*

*ble*, 27 N. J. Eq. 146, 150, quoted in *Young v. Young*, 45 N. J. Eq. 27, 29. To sustain the objection the matters must be of such distinct natures, or the forms of proceeding in relation to such several matters must be so distinct, that it would be improper, or very inconvenient, to litigate the same in one suit. *Newland v. Rogers*, 8 Barb. Ch. 482. But the rule as to misjoinder of causes of action is as applicable to the case of a sole defendant as to that of several defendants. *Latting v. Latting*, 4 Sandf. Ch. 81. A bill in which several plaintiffs demand several matters perfectly distinct and unconnected against one defendant, or in which one plaintiff demands several matters of distinct natures against several defendants, is multifarious. *Marselis v. Morris & Co.*, 1 N. J. Eq. 81; *Metcalf v. Cady*, 8 Allen, 587; *Mayer v. Denver & C. R. Co.*, 88 Fed. Rep. 197; *Lewarne v. Mexican International Imp. Co.*, 88 Fed. Rep. 629; *Crane v. Fairchild*, 14 N. J. Eq. 76; *Waller v. Taylor*, 42 Ala. 297. Where the cancellation of a certificate as asked for is merely auxiliary to the principal relief demanded, viz., the delivery of certain bonds, only one



§ 117. Multifariousness in matter — Bills held multifarious.— A bill for the rescission of a contract on the theory that it is void, and for an accounting on the theory that it is valid, is multifarious.<sup>1</sup> So, also, a bill for an injunction to restrain waste, and an account for rent due;<sup>2</sup> a bill for partition and for the enforcement of a mortgage against the estate;<sup>3</sup> a bill for relief against fraudulent conveyances by plaintiff's debtor and for relief against a cloud cast on plaintiff's title by one of such conveyances;<sup>4</sup> a bill by a creditor to set aside his debtor's conveyance to his wife for fraud, to subject the property, to compel the settlement of a subsequent assignment by the debtor for the benefit of his creditors, to remove the trustee thereunder, and to have a receiver substituted;<sup>5</sup> a bill which prayed relief against all the executors of an estate and also against one of them individually as a mortgagee, with notice of the trust, of property bought with trust funds belonging to complainants, *cestuis que trust*;<sup>6</sup> a bill blending together a demand by the plaintiff as legatee against the defendant as executor with a demand of the plaintiff in his private capacity

cause of action is stated. *Turner v. Conant*, 18 Abb. (N. Y.) N. Cas. 160. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is sufficient if each party has an interest in some matters in the suit, and that they are connected with the others. Even if one is a necessary party to some portion only of the case, the bill is not therefore necessarily multifarious. *Lenz v. Prescott*, 144 Mass. 505, 518; *Brown v. Guarantee Safe &c. Co.*, 128 U. S. 403, 412; *Woolley v. Pemberton*, 41 N. J. Eq. 894, 898; *Arnold v. Arnold*, 9 R. L. 897; *Judson v. Toulmin*, 9 Ala. 662. In *Carroll v. Roosevelt*, 4 Edw. Ch. 311, it is said the question is controlled by considerations of convenience and expediency. A bill is not multifarious when its allegations all relate to one transaction between the same parties, to one and the same subject-

matter and the same injury, although it may pray for two different modes of relief against that injury. *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 816. See, also, *Chaffin v. Hull*, 39 Fed. Rep. 887.

<sup>1</sup> *St. Louis &c. R. Co. v. Terre Haute &c. R. Co.*, 33 Fed. Rep. 440, quoting from *Shields v. Barrows*, 17 How. 180. Though a bill asking for a specific performance of a contract to convey lands, and for their partition, may be bad for multifariousness, yet, where defendants do not raise the question, and all the parties are before the court, the relief sought will be granted. *Brown v. Grandin* (N. J.), 18 Atl. Rep. 266.

<sup>2</sup> *Reed v. Reed*, 16 N. J. Eq. 248.

<sup>3</sup> *Belt v. Bowie*, 65 Md. 350.

<sup>4</sup> *Robinson v. Springfield Co.*, 31 Fla. 208.

<sup>5</sup> *Seals v. Pfeiffer*, 77 Ala. 378.

<sup>6</sup> *Cocks v. Varney*, 42 N. J. Eq. 514.

against the defendant in his individual character;<sup>1</sup> a bill seeking to enjoin and to recover damages for infringing a patent, and also to enjoin and to recover damages for the publication of slanderous circulars concerning the patent.<sup>2</sup>

**§ 118. The same subject continued — Bills held not multifarious.**—The following are instances of bills held not to be multifarious:—For the perpetuation of testimony in regard to a title and the removal of a cloud thereon;<sup>3</sup> for the vacation of deeds which were made by decedent, but not properly delivered, and for the partition of his land;<sup>4</sup> a bill for accounting between partners relating to the transactions of two separate firms, of which the parties were the only members;<sup>5</sup>

<sup>1</sup> *Davoue v. Fanning*, 4 Johns. Ch. 199. A demand against the defendant as administrator cannot be joined in the same suit with one against him individually and personally. *Latting v. Latting*, 4 Sandf. Ch. 81. Where the complainant as next of kin calls upon the defendant who is the personal representative of the intestate to answer in that capacity, and as an heir at law calls upon the defendant to account for the rents and profits, the bill is multifarious. *Van Mater v. Sickler*, 9 N. J. Eq. 488. Upon a bill by the holder of a debt secured by deed of trust, to set aside a release negligently executed by the trustee to the grantor, the plaintiff cannot have a decree for the payment of his debt by the trustee personally. *Williams v. Jackson*, 107 U. S. 478.

<sup>2</sup> *Fougeres v. Murbarger*, 44 Fed. Rep. 292. Plaintiffs, who claimed to be purchasers at an auction sale of lots held in trust by a city for the benefit of schools, filed a bill seeking to restrain a resale as interfering with their rights. It was held that an allegation added, as a short supplement, to the complaint, after the prayer for relief, to the effect that the plaintiffs are citizens and

tax-payers of the school district to be benefited by the sale, and that the sale as newly advertised is without warrant of law, and will be a great injury to the school district, cannot be considered, as the public and private controversy have no relation to each other, and should not be properly joined. *City of Fort Smith v. Brogan*, 49 Ark. 806; s. c., 5 S. W. Rep. 887. For other illustrations of bills pronounced multifarious see *Lewarne v. Mexican International Imp. Co.*, 88 Fed. Rep. 629; *Mobile Sav. Bank v. Burke* (Ala.), 10 So. Rep. 828; *Price v. Coleman*, 81 Fed. Rep. 857; *Harlan v. Person* (Ala.), 9 So. Rep. 879; *West v. Randall*, 2 Mason, 181; *American R. & C. Co. v. Linn* (Ala.), 7 So. Rep. 191; *East v. East*, 80 Ala. 199; *McDonnell v. Eaton*, 18 Fed. Rep. 710; *Shaffer v. Fetty*, 30 West Va. 248; s. c., 4 S. E. Rep. 278; *Chapin v. Sears*, 18 Fed. Rep. 814; *Griffith v. Segar*, 29 Fed. Rep. 707; *Hayes v. Dayton*, 8 Fed. Rep. 702; *Shickle v. South St. Louis Foundry Co.*, 22 Fed. Rep. 105.

<sup>3</sup> *Cleland v. Casgrain* (Mich.), 52 N. W. Rep. 460.

<sup>4</sup> *Vreeland v. Vreeland* (N. J. Err. & App.), 24 Atl. Rep. 551.

<sup>5</sup> *Lewis v. Loper*, 47 Fed. Rep. 259.

for subjecting land attached, and also to remove the lien of a judgment charged to be fraudulent as against the attachment;<sup>1</sup> to obtain the construction of a will and to recover property held by several persons by titles under it;<sup>2</sup> to establish a resulting trust, and for partition, where the partition is decreed incidentally, to afford complete relief and avoid multiplicity of suits;<sup>3</sup> for partition of lands among the heirs, and incidentally thereto an allotment of dower, and sale of enough land to pay taxes due, and an adjustment and equalization of advancements;<sup>4</sup> for partition and account by the same bill;<sup>5</sup> a bill setting up an equitable title to the land in the widow, and praying that if that claim shall fail that dower may be assigned;<sup>6</sup> a bill filed by an execution creditor seeking to set aside fraudulent conveyances, and at the same time to reach other property of the debtor which is not the subject of execution at law and respecting which a discovery is prayed;<sup>7</sup> a bill to wind up a partnership and for partition of real estate;<sup>8</sup> a bill praying for an injunction to restrain the use of an erroneous appraisal of damages for land taken by eminent domain, as a defense to an action for the actual value, and also for an order directing a new appraisal;<sup>9</sup> a bill for specific performance of a contract to convey land, with a prayer for

<sup>1</sup> *Stewart v. Stewart*, 27 West Va. 167.

<sup>2</sup> *Withers v. Sims*, 80 Va. 651.

<sup>3</sup> *Appeal of Hays*, 123 Pa. St. 110; a. c., 16 Atl. Rep. 600.

<sup>4</sup> *Marshall v. Marshall*, 86 Ala. 383; s. c., 5 So. Rep. 475.

<sup>5</sup> *Obert v. Obert*, 10 N. J. Eq. 98.

<sup>6</sup> *Rockwell v. Morgan*, 18 N. J. Eq. 384.

<sup>7</sup> *Randolph v. Daly*, 16 N. J. Eq. 314.

<sup>8</sup> Held not fatal on appeal. *Briges v. Sperry*, 95 U. S. 401. The plaintiff held a judgment lien upon certain real estate of which a trust mortgage had been made which if valid had priority, and brought a suit for the setting aside or postponing of the mortgage as void against him, for a

foreclosure of the judgment lien and for possession, making the mortgagors and the trust mortgagee defendants. It was held that the bill was not multifarious. *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282. The Connecticut Practice Act of 1879 authorizes the making of any person a defendant who claims an interest adverse to the plaintiff or whom it is necessary to bring in for a complete determination of any matters involved in the suit. But it is doubtful if that controlled the decision (though it certainly fortified it), for the court and counsel made a thorough citation and analysis of cases, English and American.

<sup>9</sup> *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316.

alternative relief by repayment of money expended in improving it.<sup>1</sup>

**§ 119. Multifariousness by misjoinder of complainants.** Complainants are not misjoined when they have a common interest in the attainable object of a suit, and their interests, though perhaps not co-extensive, are not inconsistent or con-

<sup>1</sup> *Young v. Young*, 45 N. J. Eq. 28. Where a bill in chancery, after stating the case, prayed for relief by a decree of redemption or specific performance, as the court upon the facts should deem proper, after a hearing upon the merits it was held that the bill was not objectionable as embracing distinct subjects. *Avery v. Kellogg*, 11 Conn. 562. A count for infringement of a patent and a count for interference under United States Revised Statutes (§ 4918) may be joined in the same bill. *American Roll Paper Co. v. Knapp*, 44 Fed. Rep. 609. A bill is not multifarious which assails two patents issued to the same party and which relate to the same subject, and both of which are held by the same defendant, the latter patent being for an improvement upon the earlier one. *United States v. Bell Telephone Co.*, 128 U. S. 815. A bill by a *cestui que trust* against the trustee and his grantee with notice, praying that complainant's title to one-half of the property in question may be decreed and established, and also that it may be partitioned, and one-half set off to her by metes and bounds, is not multifarious. *Durling v. Hammar*, 20 N. J. Eq. 220. For further instances of bills sustained against the objection of multifariousness of matters, see *Brown v. Guarantee, Trust & Co.*, 128 U. S. 403; *Grant v. Phoenix Mut. L. Ins. Co.*, 121 U. S. 105; *Keys v. Mathis*, 88 Kan. 212; s. c., 16 Pac. Rep. 436; *Chaffin v. Hull*, 39 Fed. Rep. 887; *Yates v. Law*, 86 Va. 117;

s. c., 9 S. E. Rep. 508; *Jones v. Van Doren*, 180 U. S. 684; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Rosenstein v. Burns*, 41 Fed. Rep. 841; *Equitable Life Ass. Soc. v. Patterson*, 1 Fed. Rep. 126; *Standart v. Burtin*, 46 Hun, 82; *Hebert v. Mutual L. Ins. Co.*, 12 Fed. Rep. 807; *Dickerson v. Winslow (Ala.)*, 11 So. Rep. 918; *Brugger v. State Investment Ins. Co.*, 5 Saw. 804; *Mann v. Higgins*, 88 Cal. 66; s. c., 28 Pac. Rep. 206; *Fitch v. Creighton*, 24 Hcw. 159; *Yellow Pine Lumber Co. v. Carroll*, 76 Tex. 135; s. c., 18 S. W. Rep. 261; *Pacific R. R. Co. v. Atlantic & Co. R. Co.*, 20 Fed. Rep. 277; *Brown v. Buckner*, 86 Va. 612; s. c., 10 S. E. Rep. 882; *Crumlish v. Shenandoah Valley R. Co.*, 28 West Va. 623; *Handley v. Heflin*, 84 Ala. 600; s. c., 4 So. Rep. 725; *United States v. Pratt Coal & Coke Co.*, 18 Fed. Rep. 708; *Chamberlin v. Jones*, 114 Ind. 458; s. c., 16 N. E. Rep. 178; *Reckefus v. Lyon*, 69 Md. 589; s. c., 16 Atl. Rep. 580; *National Bank v. Texas Investment Co.*, 74 Tex. 421; s. c., 12 S. W. Rep. 101; *Tipton v. Wortham (Ala.)*, 9 So. Rep. 596; *Thomas v. Sellman (Va.)*, 18 S. E. Rep. 146; *Pittsfield Nat. Bank v. Tailer*, 14 N. Y. Supl. 557; *Poole v. Winton*, 16 N. Y. Supl. 808; *Mills v. Hurd*, 82 Fed. Rep. 127; *Williams v. Wheaton*, 86 Ga. 223; s. c., 18 S. E. Rep. 634; *Dyer v. Cranston Print Works Co. (R. I.)*, 24 Atl. Rep. 827; *Payne v. Hook*, 7 Wall. 425; *Waters v. Hubbard*, 44 Conn. 840; *Mix v. Hotchkiss*, 14 Conn. 82; *Conover v. Sealy*, 45 N. J. Eq. 589.

flicting, and are supported by the same equity against the defendant, and his defense against one of them is his defense against the other.<sup>1</sup> Where several plaintiffs proceed upon identical titles to correct an identical wrong by the same wrong-doers with reference to the same subject-matter, the bill is not multifarious for misjoinder of complainants.<sup>2</sup> A bill for the recovery of a subject under a common title, although complainants claim in aliquot parts, against persons for withholding and diverting that subject who are jointly and severally liable therefor, is not multifarious.<sup>3</sup> The fact that two separate decrees may be necessary in order to give full relief does not necessarily make a case of misjoinder.<sup>4</sup> If two complainants should unite a joint demand against the same defendant, the bill would be demurrable for multifariousness.<sup>5</sup> Complainants with distinct causes of action alleging distinct injuries cannot unite in the same bill. To authorize them to join as complainants their cause of action must be the same, the injury the same, and they must be entitled to the same remedy.<sup>6</sup> Two alternative claims, each belonging to many persons, one of whom has no interest in one claim and others of whom have no interest in the other claim, cannot be joined in one bill in equity.<sup>7</sup>

§ 120. The same subject continued — Illustrations.— Where there was a general submission to arbitration by several insurance companies of a question of damages, and a single award was made, it was held that a bill brought by all the companies as parties plaintiff, against the other party to the award, to set it aside, was not multifarious.<sup>8</sup> A bill by devisees against the executor and a co-devisee to set aside a

<sup>1</sup> *Herbert v. Herbert*, 47 N. J. Eq. 12; *Buckeridge v. Glasse*, Cr. & Phill. 126; *Fierry v. Emmert*, 86 Md. 464.

<sup>2</sup> *Langdon v. Branch*, 87 Fed. Rep. 449.

<sup>3</sup> *Shields v. Thomas*, 18 How. (1856), 253.

<sup>4</sup> *Neal v. Rathell*, 70 Md. 592; s. c., 17 Atl. Rep. 566.

<sup>5</sup> *Harrison v. Hogg*, 2 Ves. Jr. 823, 328.

<sup>6</sup> *Plum v. Morris Canal & Banking*

Co., 10 N. J. Eq. 256, 261. See, also, *Walker v. Powers*, 104 U. S. 245; *Doggett v. Railroad Co.*, 99 U. S. 72; *Story's Equity Pleading* (10th ed.), § 279; *Bridger v. Thrasher*, 23 Fla. 883; *Keyes v. Mathes*, 88 Kan. 212; *Jeffers v. Forbes*, 28 Kan. 174.

<sup>7</sup> *Stebbins v. St. Anne*, 116 U. S. 886.

<sup>8</sup> *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. Rep. 151.

deed from the executor to his co-defendant, and for an accounting, is not multifarious, all the complainants having a common interest.<sup>1</sup> A bill by abutting land-owners to enjoin a traction company from operating a railway track on a certain street is not multifarious, where the rights under which all the plaintiffs claim are the same, and the acts complained of affect them all alike.<sup>2</sup> "It is well settled that a bill by several to compel the specific performance of a contract for the sale of real estate, in which the complainants hold distinct rights, cannot be sustained."<sup>3</sup> Persons who have been separately indicted for sales of liquor in original packages cannot unite in a bill to enjoin further prosecution, although they are respectively the agent and sub-agent of the same importer.<sup>4</sup>

**§ 121. Multifariousness by misjoinder of defendants.—** A bill which joins different claims against different defendants is multifarious.<sup>5</sup> A claim against two or more defendants cannot be properly united in the same bill with a separate claim against one only. Nor can distinct claims against two or more defendants, upon individual accounts, be thus joined.<sup>6</sup> In such case either or all of the defendants may demur.<sup>7</sup> "In order to determine whether a suit is multifarious, or, in other

<sup>1</sup> *Bolles v. Bolles* (N. J.), 14 Atl. Rep. 598.

<sup>2</sup> *Rafferty v. Central Traction Co.* (Pa.), 23 Atl. Rep. 884. See, also, *Parker v. Nightingale*, 6 Allen, 341; *Flint v. Russell*, 5 Dill. 151. Cf. *Hudson v. Maddison*, 12 Sim. 416. For other cases of proper joinder of complainants, see *Allen v. Fairbanks*, 45 Fed. Rep. 445; *Shields v. Thomas*, 18 How. 253. Joinder in bills of peace, see *Crews v. Burcham*, 1 Black, 352; *Osborne v. Wisconsin Cent. R. Co.*, 43 Fed. Rep. 824; *Smith v. Earl Brownlow*, L. R. 9 Eq. 241; *Rudge v. Hopkins*, 2 Eq. Cas. Abr. 170.

<sup>3</sup> *Marselis v. Morris & Co.*, 1 N. J. Eq. 31, 89.

<sup>4</sup> *Woolstein v. Welch*, 42 Fed. Rep. 566. For other cases, see *Ward v. Sittingbourne Ry. Co.*, L. R. 9 Ch. 488; *Blackett v. Lainbeer*, 1 Sandf.

Ch. 866; *Summerlin v. Fronterizac & Co.*, 41 Fed. Rep. 249. Injunction against unconstitutional tax. *Cutting v. Gilbert*, 5 Blatchf. 259.

<sup>5</sup> *Keith v. Keith*, 143 Mass. 262; *Emans v. Wortman*, 13 N. J. Eq. 205; *Sanborn v. Dwinnell*, 185 Mass. 236; *Stephens v. Whitehead*, 75 Ga. 294.

<sup>6</sup> *Brewer v. Norcross*, 17 N. J. Eq. 219, 225.

<sup>7</sup> *Emans v. Wortman*, 13 N. J. Eq. 205; *Boyd v. Hoyt*, 5 Paige, 65; *Swift v. Eckford*, 6 Paige, 22. Although the Mississippi statute permits distinct matters against the same defendants to be united in one bill in equity, distinct and unconnected equities against disconnected defendants may not be united in one bill. *Columbus Ins. & Co. v. Humphries*, 64 Miss. 258.



words, contains distinct matters, the inquiry is not . . . whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court in order that the suit may conclude the whole object."<sup>1</sup> The complainant may join in the same bill two good causes of complaint arising out of the same transactions where all the defendants are interested in the same claim of right and where the relief asked for as to each is of the same nature.<sup>2</sup> Where the same relief is asked against several defendants and all based upon the same transactions, and unless they can be joined in one bill a multiplicity of suits, all growing out of the same transaction, would have to be brought, the bill will not be held bad for multifariousness.<sup>3</sup>

**§ 122. The same subject continued — Bills held multifarious.**— A bill to enforce specific performance by one defendant cannot join another defendant against whom a partnership settlement is sought.<sup>4</sup> A bill for an accounting against a treasurer and a collector of a county is multifarious, the causes of action against the two officers being distinct;<sup>5</sup> and a bill which prayed relief against all the executors of an estate and also against one of them individually as a mortgagee,

<sup>1</sup> Per Sir John Leach in *Salvidge v. Hyde*, 5 Maddock, 188, 146; *Turner v. Robinson*, 1 Sim. & S. 813; *Attorney-General v. Corporation of Poole*, 4 M. & Cr. 17, 81; *Bernes v. Frick*, 88 N. J. Eq. 89, note, citing cases; *Brown v. Guarantee Trust & Co.*, 128 U. S. 404, 412; *Heggie v. Hill*, 95 N. C. 303; *Sims v. Adams*, 78 Ala. 395; *Smith v. Scribner*, 59 Vt. 96; s. c., 7 Atl. Rep. 711.

<sup>2</sup> *Varick v. Smith*, 5 Paige, 187.

<sup>3</sup> *Western L. & E. Co. v. Guinault*, 87 Fed. Rep. 528. A bill cannot be said to be multifarious unless it em-

braces distinct matters which do not affect all the defendants alike. *Payne v. Hook*, 7 Wall. 425. A bill for a foreclosure and other equitable relief incidental thereto is not multifarious because the interests of the respondents are in separate portions of the property mortgaged, nor because some relief (removal of cloud on title) is asked for which does not affect them all. *Middletown Savings Bank v. Bacharach*, 46 Conn. 518.

<sup>4</sup> *Rayzor v. Adams*, 80 Ala. 289.

<sup>5</sup> *Sumter County v. Mitchell*, 85 Ala. 813; s. c., 4 So. Rep. 705.



with notice of the trust, of property bought with the money of the estate for some of the *cestuis* under the will;<sup>1</sup> and a bill brought by an assignee of an insolvent debtor against several defendants to set aside mortgages of real estate executed to each of them separately on the same day by the insolvent debtor, in violation of the insolvent laws; also other mortgages of other real estate executed by him to a portion of the defendants separately on another day.<sup>2</sup> And a bill to restrain a town and its sergeant from collecting from complainants' employer the amount of a road tax, which it was alleged the sergeant had threatened to do, though not authorized by any town ordinance or general law, and to restrain the employer from paying the tax and deducting the amount from complainants' wages, is multifarious.<sup>3</sup> A bill in chancery charging two separate trustees for the plaintiff, each of a separate fund, with violations of their respective trusts at different times, but in pursuance of a joint fraudulent combination to defraud the plaintiff, is bad for multifariousness, if the fraud and combination be not found.<sup>4</sup> A bill to reform a deed which complainant had supposed conveyed her the fee, but which in reality only gave her a life-estate, and also to set aside a trust-deed on the same land which she had executed for the purpose of making a settlement on her husband and children, but without understanding its effect, is bad for multifariousness, as the trustee has no concern with the reformation of the first deed.<sup>5</sup>

<sup>1</sup> *Cocks v. Varney*, 42 N. J. Eq. 514.

<sup>2</sup> *Metcalf v. Cady*, 8 Allen, 587.

<sup>3</sup> *Buffalo v. Town of Pocahontas*, 85 Va. 222; s. c., 7 S. E. Rep. 288.

<sup>4</sup> *Coe v. Turner*, 5 Conn. 37. A bill demanded fourfold relief, to wit: *First*, a personal decree against defendant T. as indorser of notes secured by a deed of trust; *second*, a like decree against the same defendant for damages for breach of warranty in said deed; *third*, to quiet the title to a certain portion of the land as to other defendants, and to have the land in dispute sold; *fourth*, to restrain certain defendants from

cutting timber on the land. It was held multifarious. *Washington City Sav. Bank v. Thornton*, 83 Va. 157; s. c., 2 S. E. Rep. 198.

<sup>5</sup> *Van Houten v. Van Winkle* (N. J.), 20 Atl. Rep. 84. For other cases of multifariousness for misjoinder of defendants, see *Sadler v. Whitehurst*, 88 Va. 46; s. c., 1 S. Rep. 410; *Cambridge Water-works v. Somerville Dyeing Co.*, 14 Gray, 193; *Wood v. Dummer*, 8 Mason, 308; *Barre National Bank v. Hingham Mfg. Co.*, 127 Mass. 568; *West v. Randall*, 2 Mason, 181, 200; *Pope v. Leonard*, 115 Mass. 286; *Mendenhall v. Hall*, 134

§ 123. The same subject continued — Bills not multifarious.— A bill filed by an assignee in bankruptcy against several defendants to set aside various conveyances of property alleged to have been made in favor of creditors is not multifariousness;<sup>1</sup> nor a creditor's bill to set aside an alleged fraudulent conveyance, joining as defendants the various owners of separate portions of the land;<sup>2</sup> nor a bill of peace by the owner of a continuous property under a single title against several defendants who claim title thereto though from different sources;<sup>3</sup> nor a bill against the executors of an estate under a revoked will fraudulently probated, and all those who purchased from them with notice;<sup>4</sup> nor a bill that seeks to establish the lien of an equitable mortgage on lands, against the mortgagor, his grantee, and a mortgagee of the latter with notice of the lien;<sup>5</sup> nor a bill by one partner against an assignee of another to whom the latter has privately assigned the effects, asking to set aside the assignment and to wind up the concern and take the accounts;<sup>6</sup> nor a bill that asks a specific performance against one defendant, and to enjoin a suit for unlawful detainer, brought by other defendants, claiming under title from the former defendant;<sup>7</sup> nor a bill by stockholders of a corporation, seeking the cancellation of two deeds of trust executed by the corporation conveying its property for want of authority to execute them, some of the bonds secured by each deed being owned by one of the defendants;<sup>8</sup>

U. S. 559, 568; *Patterson v. Kellogg*, 58 Conn. 88; *Haines v. Carpenter*, 1 Woods, 262; *Winsor v. Bailey*, 55 N. H. 218; *Copen v. Flesher*, 1 Bond, 440; *White v. Curtis*, 2 Gray, 467; *Brian v. Thomas*, 68 Md. 476; *Cousens v. Rose*, L. R. 12 Eq. 866; *Kingsbury v. Flowers*, 65 Ala. 479; *Simpson v. Wallace*, 88 N. C. 477; *Hayes' Appeal*, 123 Pa. St. 110; *Story's Equity Pleading* (10th ed.) § 271, n. a.

<sup>1</sup> *Jones v. Slausson*, 83 Fed. Rep. 632. See, also, *Potts v. Hahn*, 82 Fed. Rep. 660; *McLean v. Lafayette Bank*, 8 McLean, 415; *Dodge v. Briggs*, 27 Fed. Rep. 160; *Gaines v. Manseaux*, 1 Woods, 118.

<sup>2</sup> *Russell v. Garrett*, 75 Ala. 848;

*Commonwealth v. Drake*, 81 Va. 305; *Randolph v. Daly*, 16 N. J. Eq. 818; *Rinehart v. Long*, 95 Mo. 396. See, also, *Field v. Holzman*, 98 Ind. 205; *Bobb v. Bobb*, 8 Mo. App. 257; *Importers' & Traders' Bank v. Littell*, 41 N. J. Eq. 29.

<sup>3</sup> *Hyman v. Wheeler*, 83 Fed. Rep. 629. See, also, *United States v. Curtner*, 26 Fed. Rep. 296, 298.

<sup>4</sup> *Gaines v. Chew*, 2 How. 619.

<sup>5</sup> *Oliva v. Bunaforza*, 81 N. J. Eq. 895.

<sup>6</sup> *Hayes v. Heyer*, 4 Sandf. 485.

<sup>7</sup> *Shafer v. O'Brien*, 81 West Va. 601; s. c., 8 S. E. Rep. 293.

<sup>8</sup> *Hardie v. Bulger*, 66 Miss. 577; s. c., 6 S. Rep. 186.

nor a bill for the payment by a corporation of a dividend from money in its hands, and for the recovery from the treasurer of money misappropriated, and the application of that money to a dividend;<sup>1</sup> nor a bill filed by heirs to settle an estate and making an administrator *de bonis non*, and the administrators of a previous administrator *de bonis non*, and the owner of the only indebtedness existing against the estate, which indebtedness is assailed as invalid, parties;<sup>2</sup> nor a bill by the surety of a defaulting collector, joining as defendants the principal, the co-sureties, and the purchasers from them with notice of the lien created by the bond.<sup>3</sup> Where there were two mercantile firms and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms, and also against the surviving partner of one of the firms.<sup>4</sup> So where the United States brought one suit against several parties having several interests in lands the patents to which the United States sought to vacate.<sup>5</sup>

**§ 124. Multifariousness of bills by and against officers and stockholders.**—A claim against the directors of a corporation, under a statute, on the ground that its debts exceed

<sup>1</sup> *Dunphy v. Travelers' Newspaper Ass'n*, 146 Mass. 495; s. c., 16 N. E. Rep. 426.

<sup>2</sup> *Deans v. Wilcoxon*, 25 Fla. 980; s. c., 7 So. Rep. 168.

<sup>3</sup> *Schussler v. Dudley*, 80 Ala. 547; s. c., 2 So. Rep. 526.

<sup>4</sup> *Nelson v. Hill*, 5 How. 127.

<sup>5</sup> *United States v. Curtner*, 26 Fed. Rep. 296. See generally for cases where bills have been sustained, *First Nat. Bank v. Moore*, 48 Fed. Rep. 799; *Williams v. Wheaton*, 88 Ga. 228; s. c., 12 S. E. Rep. 634; *Converse v. Michigan Dairy Co.*, 45 Fed. Rep. 18; *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105; *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681; *Lindley v. Russell*, 16 Mo. App. 217; *Poppenhusen v. Falke*, 4 Blatchf. 493; *Jaynes*

*v. Goepper*, 147 Mass. 309; s. c., 17 N. E. Rep. 881; *Georgia Pac. Ry. Co. v. Brooks*, 66 Miss. 588; s. c., 6 So. Rep. 467; *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. Rep. 152; *Union Pac. R. Co. v. McShane*, 3 Dill. 303; *Conover v. Sealey*, 45 N. J. Eq. 589; s. c., 19 Atl. Rep. 616; *Manners v. Rowley*, 10 Sim. 470; *Barry v. Barry*, 64 Miss. 709; s. c., 8 So. Rep. 532; *Manufacturing Co. v. Bradley*, 105 U. S. 175; *Mahler v. Schmidt*, 48 Hun, 512; *Miller v. Harris*, 7 Bart. (Tenn.) 101; *Larkins v. Biddle*, 21 Ala. 252; *Hale v. Nashua &c. R. Co.*, 60 N. H. 533; *Lockwood Co. v. Lawrence*, 77 Me. 297; *Almond v. Wilson*, 75 Va. 618; *Chipman v. Palmer*, 77 N. Y. 56; *Blaisdell v. Stephens*, 14 Nev. 17.

its capital stock, cannot be joined with a claim against its stockholders on the ground that the capital stock was not duly paid in and certified.<sup>1</sup> But a bill in equity to enforce a statutory liability of the officers of a corporation is not multifarious because it contains three distinct grounds of liability, if all the defendants are under the same liability and have a common interest.<sup>2</sup> Where a bill was brought against the president and directors of an insolvent bank for gross official misconduct and negligence, it was held to be no ground of demurrer for multifariousness that some of the defendants had been directors longer than others, because the court could discriminate between them, and hold those elected recently only liable for losses incurred during their term of office.<sup>3</sup> A bill by a stockholder against a corporation which joins a claim for restitution of property to the corporation with a claim for a payment of a dividend is not multifarious.<sup>4</sup>

**§ 125. Two or more good grounds of suit required.**—To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must concur: First, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill.<sup>5</sup> “To render the bill multifarious it must contain two or more good grounds of suit, which cannot properly be joined in the same bill, against the defendant or different defendants. For, if a good cause of complaint is joined in the bill with other allegations which could not entitle the complainant to file a bill against the defendants or either of them, such allegations are simply impertinent or afford grounds of demurrer to that part of the bill for want of equity.”<sup>6</sup> “A bill is not multifarious when it sets up one sufficient ground for equitable relief, and sets up another

<sup>1</sup> Cambridge Water-works v. Somerville Dyeing & Bleaching Co., 14 Gray, 193; Pope v. Leonard, 115 Mass. 286.

<sup>2</sup> Pope v. Salamanca Oil Co., 115 Mass. 286.

<sup>3</sup> Ackerman v. Halsey (1883), 87 N. J. Eq. 356. See, also, Lewis v. St.

Albans Iron Works, 50 Vt. 477; Sturgeon v. Purrall, 1 Ill. App. 537.

<sup>4</sup> Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495.

<sup>5</sup> Brown v. Guarantee Trust & Co., 128 U. S. 403, 412.

<sup>6</sup> Per Chancellor Walworth in Many v. Beekman Iron Co., 9 Paige, 188, 194.

claim, which, upon its face, contains no equity which can entitle the complainant to the interposition of the court, either for discovery or relief.”<sup>1</sup> Thus a bill brought by a widow to redeem from a mortgage executed by her husband, in which she joined to release dower, is not multifarious though it prays that dower be assigned her, the court having no authority to assign dower.<sup>2</sup> So where a bill states a case rendering an accounting proper, there is no misjoinder of causes of action because a transaction is embraced in the statement concerning which, if it stood alone, a sufficient legal remedy would exist.<sup>3</sup>

§ 126. **Objection for multifariousness, how taken.**—If a bill is obviously defective for multifariousness, the objection should be taken by demurrer.<sup>4</sup> “Multifariousness as to sub-

<sup>1</sup> Varick v. Smith, 5 Paige, 160, quoted and approved in Durling v. Hammar, 20 N. J. Eq. 220, 228. See, also, Patten Paper Co. v. Kaukauna Power Co., 70 Wis. 659; s. c., 85 N. W. Rep. 787; Pleasant v. Glasscock, 1 Sm. & M. Ch. 17; Richards v. Pierce, 52 Me. 562.

<sup>2</sup> McCabe v. Bellows, 1 Allen, 269. To be multifariousness it must contain more than one good distinct and severable ground for the maintenance of a suit. Lehigh Zinc & Iron Co. v. N. J. Zinc & Iron Co., 48 Fed. Rep. 545, 548.

<sup>3</sup> Rippe v. Stogdill, 61 Wis. 88.

<sup>4</sup> Snowden v. Tyler, 21 Neb. 199; 81 N. W. Rep. 661; Nelson v. Hill, 5 How. 127. “A plea that a bill is multifarious,” said Vice-chancellor Shadwell, in Benson v. Hadfield, 4 Hare Ch. 82, “is a defense I have never seen, though I know such a plea has, whether successful or not, been attempted.” Concerning the propriety of taking the objection early in the cause, he continued:—“The objection of multifariousness is one which should be taken *in limine*. It is obvious that if it be not so

taken, the mischief is generally incurred before the defendant can obtain any benefit from the objection. The defendant may be subjected to the expense of taking copies of papers relating to matters with which he has no concern and be kept before the court on the discussion of points in which he is not interested. If the defendant does not take the objection *in limine*, the court, considering the mischief as already incurred, does not, except in special cases, allow it to prevail at the hearing. All that the court can do in this case is to protect the defendant from the costs incurred if it shall hereafter appear he has been improperly subjected to costs.” The case was one where the defect of multifariousness was removed by amendment, but the defendant insisted that the evidence showed that complainant’s case was really multifarious. That the objection should be taken by demurrer if apparent, see, also, Grove v. Fresh, 9 Gill & J. 281; Avery v. Kellogg, 11 Conn. 562; Moreau v. Saffarans, 8 Sneed (Tenn.), 595; Bell v. Woodward, 42 N. H. 181,

jects or parties within the jurisdiction of a court of equity cannot be taken advantage of by a defendant except by demurrer, plea or answer to the bill, although the court in its discretion may take the objection at the hearing or on appeal, and order the bill to be amended or dismissed.<sup>1</sup> *A fortiori* it does not render a decree void so that it can be treated as a nullity in a collateral action."<sup>2</sup>

**§ 127. Objection by whom taken.**—As a general rule an objection for multifariousness cannot be made by a defendant who is not affected by it.<sup>3</sup> The joinder of a defendant against whom no valid claim is made and no relief can be sought will not sustain a demurrer for multifariousness by another defendant.<sup>4</sup> If no decree can be made against one defendant, a co-defendant cannot raise the objection of multifariousness.<sup>5</sup> Where a joint claim against two defendants is united in the same bill with a separate claim against one of them only, either or both of the defendants may demur for multifariousness.<sup>6</sup>

**§ 128. Demurrer for multifariousness.**—To sustain a demurrer to a bill for multifariousness against several defendants, it is not necessary that the defendant demurring should so far answer the bill as to deny the ordinary general charge

189. By statute in Tennessee the objection must be made by demurrer or by motion to dismiss. Gibson's Suits in Chancery, § 292.

<sup>1</sup> Oliver v. Piatt, 8 How. 383, 412; Nelson v. Hill, 5 How. 127, 182. See, also, Greenwoods v. Churchill, 1 M. & K. 559; Labadie v. Hewitt, 85 Ill. 341; Davoue v. Fanning, 4 Johns. Ch. 199; Bissell v. Beckwith, 88 Conn. 357; Dial v. Reynolds, 96 U. S. 340; Annin v. Annin, 24 N. J. Eq. 184; Rockwell v. Morgan, 13 N. J. Eq. 384; Sanborn v. Adair, 27 N. J. Eq. 425; Matthewson v. Johnson, Hoff. Ch. 560; Ohio v. Ellis, 10 Ohio, 456; Davies v. Quarterman, 4 Y. & Coll. 257; Abbott v. Johnson, 82 N. H. 9; Cousins v. Rose, L. R. 12 Eq. 366. A bill which sets up distinct and differ-

ent causes of complaint which destroy each other and seeks different reliefs inconsistent with each other is multifarious; and although no advantage be taken of the defect by the pleadings, the court may dismiss the bill, and will do it where the form of the bill embarrasses the court in the administration of justice. Swayze v. Swayze, 9 N. J. Eq. 278.

<sup>2</sup> Heffner v. Northwestern Mut. L. Ins. Co., 123 U. S. 747.

<sup>3</sup> See Dykers v. Wilder, 8 Edw. Ch. 496, 497.

<sup>4</sup> Varick v. Smith, 5 Paige, 187.

<sup>5</sup> Norton v. Woods, 5 Paige, 249, 256.

<sup>6</sup> Emans v. Wortman, 13 N. J. Eq. 205.

of combination.<sup>1</sup> A bill will not be dismissed for multifariousness after the pleadings and proofs are in, unless it be of such a character as to embarrass the court in making a decree in the case binding upon the parties, and which cannot be carried into execution consistently with the rules and practice of the court.<sup>2</sup> Where a bill is obviously defective for multifariousness, if the defendant neglects to demur and answer on the merits and the bill is dismissed for multifariousness on the hearing, it may deprive the defendant of costs.<sup>3</sup> A demurrer for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill; and if the demurrer is allowed, the bill will be dismissed as to the parties who demur.<sup>4</sup> A general demurrer on the ground of multifariousness, which is not sustained as to the only part which makes it multifarious, will be overruled.<sup>5</sup>

§ 129. Summary statement of the doctrine of multifariousness.—A learned author has recently summed up the rule of multifariousness as follows:—"To make a bill demurrable for multifariousness it must contain all of the following characteristics: 1. It must join two or more causes of action against two or more defendants. 2. These two or more causes of action must have no connection or common origin, but must be separate and independent. 3. The evidence pertinent to one or more of the causes must be wholly impertinent as to the other or others. 4. One or more of these separate and independent causes of action must be capable of being fully determined, without any necessity of bringing in the other cause or causes in order to adjust any of the legal or equi-

<sup>1</sup> *Emans v. Wortman*, 18 N. J. Eq. 205, 207.

<sup>2</sup> *Hays v. Doane*, 11 N. J. Eq. 84; *Tullar v. Baxter*, 59 Vt. 467; s. c., 8 Atl. Rep. 493; *Wade v. Pulcifer*, 54 Vt. 45.

<sup>3</sup> *Harrison v. Righter*, 11 N. J. Eq. 339. The objection of multifariousness to a bill which sets forth two distinct and independent grounds of complaint is obviated by the removal of one of these grounds by the defendant after the filing of the bill

and before answer. *Whitney v. Union Ry. Co.*, 11 Gray, 859.

<sup>4</sup> *Boyd v. Hoyt*, 5 Paige, 65; *White v. White*, 5 Gill, 359; *McIntosh v. Alexander*, 16 Ala. 87; *Gibbs v. Claggett*, 2 Gill & J. (Md.) 14. But the defendant is always permitted to amend upon terms, unless there are other fatal defects in the bill. *Walker v. Powers*, 104 U. S. 245; *Price v. Coleman*, 21 Fed. Rep. 357.

<sup>5</sup> *Brownlee v. Lockwood*, 20 N. J. Eq. 239.



table rights of the parties. 5. The decree proper, as to one or more of these separate and independent causes of action, must be exclusively against one or more of the defendants, and the decree proper as to the other cause or causes must be exclusively against the other defendant or defendants. 6. The relief proper against one or more of the defendants, on one or more of these separate and independent causes of action, must be distinct from the relief proper against the other defendant or defendants on the other cause or causes of action. 7. The satisfaction of the proper decree by any of the defendants, to the extent of his alleged liability, on any one or more of said distinct causes of action, must not be a satisfaction of the proper decree against the other defendant or defendants on the other cause or causes of action. 8. Upon the consideration of the entire bill the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest.”<sup>1</sup>

**§ 130. Bills of discovery.**—By reason of the statutes which enable a party to a suit at law to compel his adversary to testify, the jurisdiction of equity in respect of pure bills of discovery has become practically inoperative and obsolete,<sup>2</sup> and whether it has ceased to exist and can no longer be invoked is a question on which there is some conflict of judicial opinion. It was held in Michigan that bills of discovery could no longer be maintained in that State.<sup>3</sup> It has also been de-

<sup>1</sup> Gibson's Suits in Chancery, § 292.

<sup>2</sup> In *Preston v. Smith*, 26 Fed. Rep. 884, 889, Judge Brewer said “they have fallen into a condition of ‘innocuous desuetude.’”

<sup>3</sup> *Riopelle v. Doellner*, 26 Mich. 102; *Sheldon v. Walbridge*, 44 Mich. 251. In the case first cited the court said:—“Since the statutes have allowed parties to become general witnesses there seems to be no further office for a bill of discovery. It was never as desirable a means of obtaining the testimony of a party as the present method. But it was the only means formerly existing whereby any disclosures could be enforced in aid of legal proceedings. It was always an exceptional process, confined to the

necessity of the case, and when the necessity does not exist there is no room for the practice. It has always been held that when a court of law could enforce the production of documents or any other disclosure required by a party of his adversary, that was a complete answer to a bill of discovery; and now this can be done in all cases more readily and completely than was possible by bill.” But the statute making parties competent witnesses did not operate to repeal express statutory provisions for compelling discovery in certain cases. *McCreery v. Bay* Circuit Judge (Mich.), 58 N. W. Rep. 618.

cided in several cases in the federal courts that a pure bill of discovery is no longer maintainable.<sup>1</sup>

§ 131. The same subject continued.— On the other hand, Judge Wallace, of the United States circuit court, sustained a bill of discovery in aid of a suit at law, pointing out that such a bill would lie not only when the plaintiff was destitute of other evidence than the oath of the adverse party to establish his case, but also to avoid such evidence or to render it unnecessary,<sup>2</sup> in which respect it affords a more adequate and

<sup>1</sup> *Rindskopf v. Platto*, 29 Fed. Rep. 180, where a bill of discovery was described as a bill "to discover facts which could not be proved according to the existing forms of procedure at law." (See *Dunn v. Coates*, 1 Atk. 268, 269.) *Brown v. Swann*, 10 Pet. 497; *Heath v. Erie R. Co.*, 9 Blatchf. 319. In *Preston v. Smith*, 26 Fed. Rep. 885, 889, Judge Brewer said:—"I do not understand that a bill can be sustained solely for the sake of discovery, at least that is the general rule." In *United States v. McLaughlin*, 24 Fed. Rep. 828, 825, Sawyer, C. J., said:—"It is very doubtful whether a pure bill of discovery in an equity suit would lie at the present day. It may be that a discovery might be asked for in a bill of relief. But it is probable that no prudent counsel, understanding what must be the effect, would at this day file a pure bill of discovery or call for a discovery in a bill for relief, and thus unnecessarily give the defendant an advantage which he would not otherwise have under our present practice, which enables the complainant to place the defendant upon the stand and examine him as a witness, and thereby obtain his testimony much more judiciously—testimony of a character less prejudicial to his client's interest than it would be were the testimony to come in the form of a sworn answer strained

through the colander of his counsel and by him shaped and shaved in his office at his leisure." In *Ex parte Boyd*, 105 U. S. 647, Justice Matthews said:—"A bill in equity to compel disclosures from a plaintiff or a defendant of matters of fact peculiarly within his knowledge essential to the maintenance of the legal rights of either in a pending suit at law would scarcely be resorted to when parties are competent witnesses and can be compelled to answer under oath all relevant interrogatories properly exhibited." In *Paton v. Majors*, 46 Fed. Rep. 210, it was taken for granted that a bill could not be sustained as a bill of discovery in the federal courts in view of the judiciary act of 1789, limiting the jurisdiction of the United States courts to cases where a plain, adequate and complete remedy cannot be had at law. See, also, *Hall v. Joiner*, 1 S. C. 186; *McGough v. Insurance Bank*, 2 Ga. 151.

<sup>2</sup> Citing *Montague v. Dudman*, 2 Ves. Sr. 398; *Finch v. Finch*, 2 Ves. Sr. 491; *Brereton v. Gamul*, 2 Atk. 241; *Earl of Glengall v. Fraser*, 2 Hare, 99; *Marsh v. Davidson*, 9 Paige, 580; *Peck v. Ashley*, 12 Met. 481; *Stacy v. Pierson*, 8 Rich. Eq. 152; *Williams v. Warren*, 8 Blackf. 477, and distinguishing *Brown v. Swann*, 10 Pet. 497.

complete remedy than a disclosure in the suit at law.<sup>1</sup> So in Alabama, West Virginia and New Jersey it was distinctly declared that the statutory provisions permitting the examination of the parties to a suit as witnesses in a court of law did not deprive the court of chancery of its power to entertain a pure bill of discovery.<sup>2</sup> There seems to be no objection to a bill praying for relief as well as discovery.<sup>3</sup>

**§ 132. Bills for foreclosure.**—A bill for foreclosure must show that the mortgage debt is due and owing to the complainant; but technical precision is not essential, and it is suffi-

<sup>1</sup> *Colgate v. Compagnie Francaise*, 23 Fed. Rep. 82. Referring to the case in hand he said:—“A consideration peculiar to a bill of discovery like the present, in which the complainant seeks a discovery concerning the infringement of a patent, should be adverted to. Courts of equity in patent causes sometimes exercise the power of granting to a complainant an inspection of alleged infringing devices as incidental to ordinary discovery. *Vidi v. Smith*, 3 El. & B. 969; *Morgan v. Seward*, 1 Webst. Pat. Cas. 169; *Russell v. Cowley*, 1 Webst. Pat. Cas. 468; *Shaw v. Bank of England*, 22 Law J. Exch. 26. Courts of law have no such authority, but power to do so was conferred in England upon courts of common law by 15 and 16 Vict., ch. 83, § 42. Manifestly cases may occur where the exercise of this power is necessary in order to prevent a defendant from profiting by his own artifice. The case made by the present bill is one where, if the defendant has infringed the complainant's invention, it would be obviously difficult, if not impossible, to prove the fact, unless an inspection were granted.”

<sup>2</sup> *Wood v. Hudson (Ala.)*, 11 So. Rep. 580; *Russell v. Dickeschied*, 24 West Va. 61, 68; *Shotwell v. Smith*,

20 N. J. Eq. 79. See *Manchester Fire Ass. Co. v. Stockton Agr'l Works*, 88 Fed. Rep. 378; *Paine v. Warren*, 88 Fed. Rep. 357. In the latter case, the court, discussing the nature of bills of discovery, said:—“Neither the answers to the interrogatories nor the answer of the defendant to the bill of discovery could be offered in evidence by him on his behalf. The party propounding the interrogatories or filing the bill was not obliged to offer the answers in evidence. In this manner he could sift the conscience of his adversary without peril to himself; and although he may, if he desires to do so, compel his adversary to be examined as a witness, yet he may deem it a matter of the highest importance to learn from his answer to a bill of discovery whether he can safely examine him as a witness.” In *Kendallville Refrigerator Co. v. Davis*, 40 Ill. App. 616, the court deemed it doubtful if the jurisdiction of a pure bill of discovery had been impliedly abrogated by the statute.

<sup>3</sup> *Kendallville Refrigerator Co. v. Davis*, 40 Ill. App. 616; *Elliston v. Hughes*, 1 Head (Tenn.), 225; *Cannon v. McNabb*, 48 Ala. 99; *Millsaps v. Pfeiffer*, 44 Miss. 805; *Shotwell v. Smith*, 20 N. J. Eq. 79.

cient if the bill shows it substantially.<sup>1</sup> The allegation in a bill for a foreclosure that the respondent, to secure the debt described, "did execute to the petitioner a deed of a certain piece of land," describing it with the condition, is a sufficient averment of an interest in the mortgaged premises on the part of the petitioner to warrant the court in entertaining the bill and passing a decree upon it.<sup>2</sup>

§ 133. The same subject continued.—It is not necessary in a suit for the foreclosure of a mechanic's lien to allege in the complaint that the indebtedness arose under a particular contract. It is enough to state the indebtedness whether it arose under one contract or several.<sup>3</sup> A bill to foreclose railroad mortgage bonds alleged that the corporation duly issued and disposed of a large number of them to divers persons, who were *bona fide* holders of the same, and entitled to receive the money due thereon and to the benefit of the mort-

<sup>1</sup> *Cornelius v. Halsey*, 11 N. J. Eq. 27. An allegation in a foreclosure bill that "a great part" of the principal of a mortgage debt is due is not conclusive against complainant's claim that all of the principal is due. Such allegation is a mere averment of pleading, and is amendable. *Hagan v. Ryan*, 27 N. J. Eq. 286. In a suit to foreclose a mortgage given to secure a bond, it is not necessary to allege a consideration, both being under seal. It is sufficient to state that the mortgage was duly executed, delivered and acknowledged. *Brown v. Kahnweiler*, 28 N. J. Eq. 811. In a suit on a note and to foreclose a mortgage securing the note, though the complaint fails to allege who the mortgagee is, or that the mortgage is due and unpaid, or that it was executed to secure the note, and does not contain a description of the mortgaged premises, it is not demurrable, since plaintiff is entitled to a personal judgment on the note. *Taylor v. Hearn* (Ind.), 31 N. E. Rep. 201. In *Day v. Perkins*, 2 Sandf. Ch.

860, it was held that an allegation of indebtedness was not necessary; that a statement of the execution of the bond and mortgage was sufficient.

<sup>2</sup> The court said the question had never been adjudicated by the Supreme Court, and that "if we err, we have the satisfaction of knowing that we err in upholding manifest truth and justice against dubious, if not overnice, technicality." *Bull v. Meloney*, 27 Conn. 560, 562 (the chief justice dissenting). A complaint in an action to foreclose a mortgage which states the title of the cause, name of the court and of the county in which the suit is brought, and of the parties to the action, and alleges the execution of a note in writing for the amount claimed, and of a mortgage, also the time of the maturity of the note and its non-payment, and the fact that plaintiffs are the owners and holders of the note, states a cause of action. *Bethel v. Robinson* (Wash.), 80 Pac. Rep. 784.

<sup>3</sup> *Kiel v. Carll*, 51 Conn. (1888), 440.

gage. It was held to be a sufficient averment that the bonds were lawfully issued and used for a lawful purpose.<sup>1</sup> When, by the terms of a mortgage, it has become due by default in the payment of interest before suit is commenced, it is not necessary that the bill should formally allege that the principal is due. An allegation that no principal or interest has been paid is sufficient.<sup>2</sup> Where a mortgage contained a condition that upon the failure for ninety days to pay the interest the principal should become due, provided such failure was not caused by the fault of a third party, it was deemed sufficient to allege the default in payment of interest. If there was any fault of a third party it was matter of defense to be made out by the defendant.<sup>3</sup> The complainant need not allege the specific interest of one made a party defendant, but it is sufficient to allege generally:—"The defendant has or claims some interest in or lien upon said real property; but the same, whatever it may be, is subject to the lien of said mortgage."<sup>4</sup>

<sup>1</sup> *Mead v. New York & C. R. Co.*, 45 Conn. 199.

<sup>2</sup> *Bodine v. Gray*, 24 N. J. Eq. 385.

<sup>3</sup> *Little Rock & C. Co. v. Barrett*, 108 U. S. (1881), 516.

<sup>4</sup> *Dexter, Horton & Co. v. Long* (Wash.), 27 Pac. Rep. 271. In an action for foreclosure of a mortgage by an assignee, an omission to allege in the complaint an assignment of the bond, as well as of the mortgage, does not invalidate a judgment of foreclosure, where the assignment of both bond and mortgage is on record, and the referee's report of the amount due refers to such record. *Preston v. Loughran*, 12 N. Y. Supl. 318. A mortgage provided that in the event of foreclosure, "reasonable attorney's fees, to be taxed by the court, shall be allowed to the plaintiff." It was held that an averment that \$200 is a reasonable attorney's fee "for the collection of said promissory note, and for the foreclosure of the said mortgage," was simply

an averment that that sum was a reasonable attorney's fee in the foreclosure suit. And that even if the allegation as to attorney's fees were uncertain, it would not render the complaint demurrable, as the allegation is not necessary. *First Nat. Bank v. Holt*, 87 Cal. 158; s. c., 25 Pac. Rep. 272. See, also, *White v. Allatt*, 87 Cal. 245; s. c., 25 Pac. Rep. 420. Where the notes and mortgage set out in the complaint showed that they were made to plaintiff as "trustee of the estate of W., deceased," an averment in the complaint that plaintiff sued as "trustee for the heirs at law of W." was held immaterial and redundant, and disregarded. *White v. Allatt, supra*. Where a mortgage given by a vendor to secure the vendee against any damages arising from defects in the title which is in litigation specified an unfavorable termination of the litigation as the contingency upon which liability depends instead of an eviction, the petition for fore-

**§ 134. Bills to redeem.**—It is not essential in a bill to redeem to offer to pay the amount. There is no decree for payment, but the bill is dismissed upon default of payment, and the decree becomes equivalent to a foreclosure.<sup>1</sup> A subsequent incumbrancer will not be allowed, on a bill to redeem, to show usury in the debt of a prior incumbrance, unless the usury, and the particular facts and circumstances constituting it, are set forth in the bill. A general allegation is not sufficient.<sup>2</sup>

**§ 135. Bills for partition.**—It is not necessary to aver in a bill for partition that the complainant is in possession of the premises, as that fact is presumed from the allegation that the parties are seized in common.<sup>3</sup> And an allegation that plaintiff and defendants are seized and possessed of land is a sufficient allegation of possession by plaintiff.<sup>4</sup> Where a bill to wind up a partnership was also a bill to partition real estate, so distinct in character as to be either one or the other, the court treated it as a bill for partition, finding sufficient allegations for the purpose.<sup>5</sup> Upon a bill for the sale of land held

closure was not demurrable because it failed to allege an eviction, nor because it showed no offer to restore possession or account for rents and profits, since, if defendant was not the owner, plaintiff was not accountable to him for rents. *Nix v. Draughan* (Ark.), 15 S. W. Rep. 893.

<sup>1</sup> *Quin v. Brittain* (1840), Hoff. Ch. 353. A bill for redemption, which sets forth a liquidation by the parties of the sum payable, and an offer to pay that sum, which was refused, need not contain an offer to pay what may be found due on an account to be taken, where there is nothing to be accounted for. *Freeman v. Deming*, 8 Sandf. Ch. 450.

<sup>2</sup> *Waterman v. Curtis*, 26 Conn. (1857), 241, 246. A bill to redeem lands sold for taxes, under N. J. Rev. Sup. 992, sec. 57, must aver when the defendant received his certificate of sale, and how long he has held it, in

order that the court may see that the right of redemption has not been lost through lapse of the time limited by the statute for such redemption *Langley v. Jones*, 43 N. J. Eq. 404.

<sup>3</sup> *Jenkins v. Van Schaack*, 3 Paige, 242.

<sup>4</sup> *Balen v. Jacquelin*, 22 N. Y. Supl. 193.

<sup>5</sup> *Briges v. Sperry*, 95 U. S. 401. A complaint in partition alleged that defendant was the wife of one B., who died intestate, leaving plaintiffs, his children by a former marriage; and that before his death one R. conveyed the land to B. and defendant by a deed which recited that they were to hold the land in common. It was held that the complaint was demurrable because it did not allege that the parties thereto, at the time the suit was commenced, had any interest in the land. *Brown v. Brown* (Ind.), 82 N. E. Rep. 1123.



in common, and division of the proceeds, and also praying general relief, it was held that the bill ought to contain a prayer for partition, although by statute the court was authorized, in suits in equity for partition, to order a sale upon motion of any party to the suit.<sup>1</sup> The complainant's title must be set forth positively and determinately,<sup>2</sup> although it will be sufficient to aver as to the defendant's title that the defendant is seized in fee of, or otherwise well entitled to, the other remaining undivided parts of the premises.<sup>3</sup> An allegation that defendants have received all the rents, issues and profits from the land, and have neglected and refused to pay plaintiff his share, is not an allegation that they claim under a title hostile to the plaintiff.<sup>4</sup>

**§ 136. Bills to quiet title.**—In a bill to quiet title under a statute which requires complainant to be “in peaceable possession, claiming to own,” an averment that complainant is the owner in fee, and in possession, is sufficient; certainty to a common intent being enough.<sup>5</sup> A complaint which alleges that plaintiff “is the owner by a complete equitable title, and is entitled to the possession” thereof, is good on demurrer, without specifying the nature and extent of such title.<sup>6</sup> In a suit to set aside tax deeds as clouds on the title of lands, the allegation that the plaintiff is seized in fee-simple is a sufficient allegation that he has possession as well as title.<sup>7</sup> An

<sup>1</sup> *Dyer v. Vinton*, 10 R. L. 517.

<sup>2</sup> *Uxbridge v. Staveland*, 1 Ves. 56.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 255.

<sup>4</sup> *Balen v. Jacquelin*, 22 N. Y. Supl. 193.

<sup>5</sup> *Ludington v. Elizabeth*, 82 N. J. Eq. 159.

<sup>6</sup> *Stanley v. Holliday* (Ind.), 80 N. E. Rep. 684.

<sup>7</sup> *Gage v. Kauffman*, 133 U. S. 471. Under the laws of Arizona and the act of the territory of 1881, chapter 59, an allegation in a complaint to quiet title, that plaintiff is the owner, without setting out matters of evidence, and that defendant claims an

adverse interest, without further defining it, is sufficient to authorize a determination of the title and the granting of appropriate relief. “These conclusions accord with the decisions of the courts of California and Indiana under similar statutes, from one of which the present statute of Arizona would seem to have been taken. *Payne v. Treadwell*, 16 Cal. 220, 242-247; *Statham v. Dusy* (Cal.), 11 Pac. Rep. 606; *Heeser v. Miller*, 77 Cal. 192; s. c., 19 Pac. Rep. 375; *Jeffersonville &c. Co. v. Oyler*, 60 Ind. 383, 392; *Trittipo v. Morgan*, 99 Ind. 269.” *Ely v. New Mexico &c. R. Co.*, 129 U. S. 291.



allegation in a bill to remove a cloud on title that "said claim is an injury" to complainant is not sufficient unless facts are stated from which the court can see that there is or may be a legal injury by the existence of the claim.<sup>1</sup> A description of the land in a bill to remove a cloud as a "sand-bar," a "piece of ground," etc., is sufficient to include the term "island."<sup>2</sup> The bill should allege that the defendant's claim is hostile to the complainant's title;<sup>3</sup> but an objection for want of it comes too late after answer and proofs taken.<sup>4</sup>

<sup>1</sup> *Welles v. Rhodes*, 59 Conn. (1890), 498, 507. Defendant cannot be compelled to discover the nature of his claim unless the bill shows a legal cloud. *Welles v. Rhodes*, 59 Conn. (1890), 498, 507. In a bill filed under the New Jersey act to quiet titles (P. L. 1870, p. 20) the complainant is not required to set out the adverse right and show how or why it is invalid; it is sufficient to allege that it is claimed or reputed that there is an outstanding hostile right. *Southmayd v. Elizabeth*, 29 N. J. Eq. 208. And objections that the complainant has not alleged peaceable possession of the premises in dispute, and that no action to test the defendant's title thereto was pending, come too late at the hearing. *McClave v. Newark*, 31 N. J. Eq. 472.

<sup>2</sup> *Butler v. Grand Rapids &c. R. Co.* (Mich.), 48 N. W. Rep. 569.

<sup>3</sup> *Campbell v. Disney* (Ky.), 18 S. W. Rep. 1027.

<sup>4</sup> *Cleland v. Casgrain* (Mich.), 53 N. W. Rep. 460. Plaintiff's bill alleged that a patent of certain land was in 1872 issued to the heirs at law of one S., the heirs being his mother and several brothers and sisters, and the children of deceased brothers and sisters; that plaintiff was married in 1870 to R., a son of a deceased sister; that R. died intestate, without issue, in 1871; that in 1870, after said marriage, the mother of S.

conveyed her interest in the land to R.; that by virtue of the deed, and the statutes of Washington relating to the rights of married people, the share of R. and of the mother of S., deeded to him, became the common property of R. and plaintiff, and on R.'s death plaintiff became the owner in fee-simple of an undivided one-half; that defendants claimed the whole of the land under a conveyance made pursuant to a sale under a decree of the court, to which plaintiff was not a party. The bill sought to establish plaintiff's title to the shares claimed by her. It was held that the bill was demurrable in not stating when and where S. died, or any facts by which the court could ascertain under what act of congress the patent was issued to his heirs, and what laws as to the property rights of married people were in force, or the residence of R. and his wife (plaintiff), or the date of the suit under which the sale and conveyance was made to defendants, or any reasons for plaintiff's delay in suing. *Hershberger v. Blewett*, 46 Fed. Rep. 704. A complaint to remove cloud on title alleged that "plaintiff and its grantors had been in actual, open and notorious possession of said property continuously since the 28th day of March, 1862, under color and claim of title; that neither defendant nor his ancestors

**§ 137. Bills to reform instruments.**— The bill for reformation must aver either fraud, accident or mistake, or circumstances from which fraud or mistake are necessarily implied.<sup>1</sup> A bill for the correction of an insurance policy should show clearly the parol contract that was made and in what the error consists.<sup>2</sup> A bill to reform a contract for mistake in reducing it to writing, there having been no mistake in the contract as agreed on, need not allege that the mistake was mutual.<sup>3</sup> A bill for reformation of a power of attorney, which seeks also to set aside a sale made thereunder because of defendant's alleged bad faith in making it, need not aver a request to correct the mistake before filing the bill, as the court having jurisdiction to set aside the sale will administer complete relief.<sup>4</sup> A bill for the reformation of a written contract should embody both the defective instrument and the real agreement.<sup>5</sup>

**§ 138. Bills for specific performance.**— On bill for the specific performance of an agreement for the purchase and sale of land, where the defendant's refusal to perform is based on alleged defects in the complainant's title, full statement

nor predecessors have been seized or possessed of the premises in question, or any part or parcel thereof, within more than ten years before the date of commencement of this suit." The complaint was held sufficient to admit evidence of plaintiff's adverse possession. *Bellingham Bay Land Co. v. Dibble* (Wash.), 81 Pac. Rep. 80.

<sup>1</sup> *Appeal of Hollenback* (Pa.), 15 Atl. Rep. 616.

<sup>2</sup> *Bishop v. Clay &c. Ins. Co.*, 49 Conn. 167.

<sup>3</sup> *Born v. Schrenkeisen*, 110 N. Y. 55; s. c., 17 N. E. Rep. 389.

<sup>4</sup> *Miller v. Louisville &c. R. Co.*, 88 Ala. 274; s. c., 4 So. Rep. 842. A married woman, in a suit against her husband to have reformed a certain deed executed by him to her, alleged that for a valuable consideration the defendant sold to her certain land; that he

agreed that he would execute a deed conveying to her the property during her natural life, and then to her heirs and assigns forever; that by mutual mistake the words "and then to her heirs and assigns forever" were omitted from the deed; that defendant directed the person who wrote the deed to insert the said words, but he through mistake omitted them; that plaintiff did not find out the mistake until a short time before bringing the suit. It was held that the complaint was faulty in not stating the terms of the agreement between the parties which the deed was given to effectuate, but that defendant waived the defect by filing an answer. *Hyland v. Hyland*, 19 Oregon, 51; s. c., 28 Pac. Rep. 811.

<sup>5</sup> *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16.

and proof of the title is required.<sup>1</sup> A complaint for specific performance, which alleged that defendant executed a contract wherein it offered to convey lands at a certain price, and to keep the offer open for two years, provided plaintiff would insure the property for defendant's benefit, was held insufficient, for failure to allege that plaintiff did insure the property.<sup>2</sup> But where the bill set out the contract, which recited that it was executed for "valuable consideration," it was a sufficient allegation that the contract was founded on a valuable consideration.<sup>3</sup> In a suit for specific performance of a bond to make "a good and valid deed in common form," the bond is properly declared on in accordance with its legal effect as an obligation to convey "in fee-simple by warranty deed."<sup>4</sup> The bill must allege the legal obligations created by the contract sought to be enforced, and it is not sufficient where it simply states that a contract was made as shown by an exhibit.<sup>5</sup> Where the defendant sets up a different agreement in his answer, the plaintiff cannot avail himself of it without amending his bill.<sup>6</sup> Where complainant's right to maintain the bill de-

<sup>1</sup> *Cornell v. Andrus*, 86 N. J. Eq. 821.

<sup>2</sup> *Chadbourne v. Stockton Savings & Loan Soc.*, 88 Cal. 686; s. c., 26 Pac. Rep. 529. A bill against the executor and minor devisees of a testator, to compel the conveyance of property which he contracted to sell complainants upon the execution of certain notes, sufficiently avers the performance of the conditions precedent on the part of complainants by alleging generally that they are ready to execute the notes upon receiving the conveyance, it not being necessary to allege an offer to perform by a tender of the notes to the executor, as he had no power to convey. *Deglow's Ex'r v. Meyer* (Ky.), 15 S. W. Rep. 875. In a suit for specific performance of a contract to convey land the petition is not demurrable for failure to allege payment of the cash payment as agreed, or the execution, tender or delivery to defendant of a mortgage

to secure the deferred payments, where it does allege that plaintiff has duly performed all the conditions of the contract on his part. *Pomeroy v. Fullerton* (Mo.), 21 S. W. Rep. 19.

<sup>3</sup> *Byars v. Thompson*, 80 Tex. 463; s. c., 15 S. W. Rep. 1067.

<sup>4</sup> *Phillips v. Herndon*, 78 Tex. 378; s. c., 14 S. W. Rep. 857.

<sup>5</sup> *Guadalupe County v. Johnston* (Tex.), 20 S. W. Rep. 833.

<sup>6</sup> *Buck v. Dowley* (1860), 16 Gray, 555. Where there is no offer in the bill to pay the balance of the purchase-money, but the case shows that the tender would have been only an empty show, and the court has power to require its payment, the allegation is merely formal and the want of it becomes immaterial. *Moore v. Crawford*, 180 U. S. 122. Where the allegations of the complaint, in an action against two owners of land for specific performance of a contract to sell and convey land

pend on acts of part performance they must be clearly set forth. An allegation merely that he entered upon the premises and made valuable improvements is insufficient.<sup>1</sup> If the contract is alleged to be in writing, it is not necessary to allege it to be signed by the party, but it will be presumed to be so signed.<sup>2</sup>

§ 139. Bills to set aside fraudulent conveyances.— In an action to set aside a deed as fraudulent, the complaint will be fatally defective unless it avers delivery of the deed.<sup>3</sup> A complaint which fails to state that the debtor was insolvent is demurrable.<sup>4</sup> One who attacks an assignment on the ground that it is fraudulent as to creditors of the assignor existing at the time of the execution must allege and prove that there were such creditors at that time.<sup>5</sup> But an allegation that de-

signed by one only, were that defendants were the equitable owners of the land, but that the legal title stood in the name of one only, such averment of ownership was sufficient as against a motion for judgment upon the pleadings, though it might have been obnoxious to a special demurrer, or to a motion to make more definite and certain. *Rice v. Bush*, 16 Colo. 484; s. c., 27 Pac. Rep. 720.

<sup>1</sup> *Fowler v. Sunderland*, 68 Cal. 414. Where a written contract, describing land to be conveyed, is uncertain, and is to be reformed on account of the mutual mistake or omission of the parties in reducing it to writing, or where the description of the land can be made sufficiently certain by extrinsic evidence, the petition should allege all the facts, and what is desired, before a specific performance is decreed; and all the matters in controversy between the parties, whether as to the reformation of the contract, if one is necessary, or the identification of the property by extrinsic evidence, should be settled and concluded in the action for the specific performance, and the de-

scription not left to be corrected by another action for that purpose. *Bacon v. Leslie* (Kan.), 31 Pac. Rep. 1066.

<sup>2</sup> *Dunn v. Calcraft*, 2 Sim. & Stu. 58; *Cozine v. Graham*, 2 Paige, 177; *Story's Equity Pleading* (10th ed.), § 253.

<sup>3</sup> *Doerfler v. Schmidt*, 64 Cal. 265; s. c., 30 Pac. Rep. 816. For proper parties to the bill, see § 72, *supra*.

<sup>4</sup> *Shew v. Hews*, 126 Ind. 474; s. c., 26 N. E. Rep. 483.

<sup>5</sup> *Burton v. Platter*, 53 Fed. Rep. 901 (C. C. App.). See, also, *Braley v. Byrnes*, 20 Minn. 485, 488; *Bruggerman v. Hoerr*, 7 Minn. 337, 343; *Stone v. Myers*, 9 Minn. 308. If he attacks the assignment on the ground that it is fraudulent as to those who become creditors of the assignor subsequent to its execution, "he must allege and prove that the assignor made the conveyance with the actual intent to defraud, with the intent to put the assigned property out of the reach of debts which he intended thereafter to contract, and which he had reasonable grounds to believe he would not be able to pay, and that

fendant did not have at the time of the conveyance, and has not had, up to the time of the commencement of the suit, sufficient property subject to execution to pay his debts, is a sufficient allegation of his insolvency during that period.<sup>1</sup> Where a bill by several creditors to subject property alleged to have been disposed of fraudulently by their debtor states that "the prices for the goods sold by them are owing, unpaid and due," it is a sufficient allegation, on demurrer, that the debts were due and demandable when the bill was filed.<sup>2</sup> To entitle the assignee of a judgment to proceed in equity to subject to the payment of his debt property which has been fraudulently conveyed, it is not necessary to aver in the bill that the assignment was in writing.<sup>3</sup> Where the allegations of fraud are positive and specific, they are properly taken as true on the bill being taken as confessed.<sup>4</sup>

he subsequently did contract such debts in pursuance of that fraudulent intent. Even a voluntary conveyance is not fraudulent *per se* as to subsequent creditors." *Burton v. Platter*, 53 Fed. Rep. 901, 906, citing *Harbach v. Hill*, 112 U. S. 144, 149; *Clark v. Killian*, 103 U. S. 766, 769; *Wallace v. Penfield*, 106 U. S. 260; *Graham v. Railroad Co.*, 102 U. S. 148, 158; *Cunningham v. Williams*, 42 Ark. 170, 173; *Toney v. McGehee*, 88 Ark. 419.

<sup>1</sup> *York v. Rockwood* (Ind. Sup.), 81 N. E. Rep. 1110, holding also that where the conveyance was made to a grantee who paid no consideration, it was not necessary to allege or prove notice to the grantee of the fraudulent intent of the grantor.

<sup>2</sup> *Gibson v. Trowbridge Furniture Co. (Ala.)*, 9 So. Rep. 870.

<sup>3</sup> *Jones v. Smith*, 92 Ala. 455; s. c., 9 So. Rep. 179.

<sup>4</sup> *Welsh v. Solenberger*, 85 Va. 441; s. c., 8 S. E. Rep. 91. A bill to subject to the claims of creditors property alleged to have been disposed of fraudulently by their debtor should set forth the character of the several demands and when they became

due. *Gibson v. Trowbridge Furniture Co. (Ala.)*, 9 So. Rep. 870. In a suit to set aside an assignment for the benefit of creditors as fraudulent, where a person is properly charged in the bill as assignee, it is not a good objection that he is not so styled in the prayer for process or subpoena. *White v. Davis (N. J.)*, 21 Atl. Rep. 187. The complaint in an action to set aside a fraudulent conveyance, before judgment obtained, is not demurrable because it makes no formal demand for judgment against the debtor for the amount due from him, facts sufficient to warrant such a judgment being stated. *Miller v. Hughes*, 83 S. C. 530; s. c., 12 S. E. Rep. 419. In an action to set aside as fraudulent a deed of lands, the *habendum* clause of which reads, "to have and to hold what interest and title I may and do have by reason of my survivorship of my late wife, to whom said lands belonged," the bill must show what interest the vendor had, and its value, and deny the adequacy or payment of the consideration. *Moorer v. Moorer*, 87 Ala. 545; s. c., 6 So. Rep. 289.

**§ 140. Creditors' bills.**— A creditors' bill must aver that the judgment debtors or some of them resided in the county to which the execution at law was issued at the time of issuing it, otherwise the bill will be dismissed<sup>1</sup> and an injunction allowed thereon will be dissolved.<sup>2</sup> Where it appeared from the evidence in a creditors' suit that execution was issued to the sheriff of the county where the judgment was recovered and where the defendant was served, and that some years afterward the judgment debtor resided in that county, the omission of any allegation in the bill as to the residence of the judgment debtor at the time of the issuance and delivery of the execution did not deprive the court of jurisdiction, especially when the objection was raised for the first time on appeal.<sup>3</sup> A defendant in a judgment creditors' bill cannot be compelled to discover property to a later date than the filing of the bill. A supplemental bill is necessary to discover as well as to reach property subsequently acquired.<sup>4</sup> A creditor, to entitle himself to the aid of the court in the recovery of his debt, must show that he has prosecuted his debtor at law to judgment and execution so as to have gained a legal lien and preference at the time of filing the bill or at least before issue joined.<sup>5</sup> A creditors' bill based on a valid and subsisting judgment wholly unsatisfied against an insolvent corporation need not allege that the judgment was based on a valid and subsisting debt.<sup>6</sup>

**§ 141. When a bill of interpleader will lie.**— Where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them.<sup>7</sup> The attitude of the complainant in a bill of inter-

<sup>1</sup>Wilbur v. Collier, Clarke's Ch. 315; Gregory v. Valentine, 4 Edw. Ch. 282.

<sup>2</sup>Smith v. Fitch, Clarke's Ch. 265.

<sup>5</sup>Williams v. Brown, 4 Johns. Ch. 682.

<sup>3</sup>Deimel v. Brown, 136 Ill. 586;

s. c., 27 N. E. Rep. 44; distinguishing

Durand v. Gray, 129 Ill. 9; s. c., 21

N. E. Rep. 610.

<sup>6</sup>Tatum v. Rosenthal (Cal.), 80 Pac. Rep. 136.

<sup>4</sup>Hope v. Brinkerhoff, 4 Edw. Ch.

<sup>7</sup>A bill of interpleader is ordinarily filed "where two or more persons



pleader was thus defined by Lord Cottenham:<sup>1</sup>—"The definition of interpleader is not and cannot be disputed. It is where the plaintiff says, 'I have a fund in my possession in which I claim no personal interest and in which you, the defendants, set up conflicting claims. Pay me my costs and I will bring the money into court and you shall contest it between you.'"<sup>2</sup>

§ 142. The same subject continued.—A chose in action may be the subject of interpleader.<sup>3</sup> The bill is proper, although the claim of one defendant be actionable at law and

claim the same debt, or duty, or other thing, from the complainant by different or separate interests; and he, not knowing to which of the claimants he ought of right to render the same debt, duty or other thing, and fearing that he may suffer injury from their conflicting claims, files a bill against them, and prays that they may be compelled to interplead and state their several claims, so that the court may adjudge to whom the same debt, duty or other thing belongs." Story's Equity Pleading (10th ed.), § 291. "To sustain an action of interpleader it must appear that the plaintiff is ignorant of the rights of the respective claimants." Trigg v. Hitz, 17 Abb. Pr. 486; Machine Co. v. Gifford, 66 Barb. 599; Morgan v. Fillmore, 18 Abb. Pr. 217. The plaintiff must show that "he is ignorant which claimant has the better right." Railroad Co. v. Arthur, 90 N. Y. 284, 287; Taylor v. Satterthwaite, 22 N. Y. Supl. 187, 188. "The object of a bill of interpleader is to protect the complainant where he stands in the situation of a stakeholder, not knowing to whom to pay the money or to deliver the property in his hands, and where a recovery against him at the suit of one party might not be a protection against the claim made by the other." Per

Chancellor Walworth, in *Badeau v. Rogers* (1880), 2 Paige, 209, 210; *Hastings v. Cropper*, 3 Del. Ch. 165; *Bedell v. Hoffman*, 2 Paige, 199; *Strange v. Bell*, 11 Ga. 108; *Shaw v. Coster*, 8 Paige, 839; *Cullen v. Dawson*, 24 Minn. 66; *Bell v. Hunt*, 3 Barb. Ch. 391; *Green v. Mumford*, 4 R. L. 313; *Sprague v. West*, 127 Mass. 471; *Morse v. Stearns*, 181 Mass. 889; *Hayes v. Johnson*, 4 Ala. 267; *National Life Ins. Co. v. Pingrey*, 141 Mass. 411; *Farley v. Blood*, 80 N. H. 354; *Louisiana State Lottery Co. v. Clark*, 16 Fed. Rep. 20; *McWhirter v. Halsted*, 24 Fed. Rep. 828; *Bartlett v. The Sultan*, 23 Fed. Rep. 257; *Pfister v. Wade*, 56 Cal. 43; *Providence Bank v. Wilson*, 4 R. L. 507; *Blake v. Garwood*, 42 N. J. Eq. 276; *Wing v. Spaulding* (Vt.), 23 Atl. Rep. 615; *Fitch v. Brower*, 42 N. J. Eq. 300; *Atkinson v. Manks*, 1 Cowen, 691; *De Zouche v. Garrison* (Pa.), 21 Atl. Rep. 450; *Wallace v. Sorter*, 52 Mich. 159; *Orr W. D. Co. v. Larcombe*, 14 Nev. 58; *Hechmer v. Gilligan*, 28 West Va. 750.

<sup>1</sup> In *Hoggart v. Cutts*, Craig & P. 197, quoted in *Wing v. Spaulding* (Vt.), 23 Atl. Rep. 615.

<sup>2</sup> *Hoggart v. Cutts*, Craig & P. 197.

<sup>3</sup> *Robinson v. Jenkins*, 24 Q. B. D. 275.



the other in equity,<sup>1</sup> and although the complainant has not been sued or has been sued by only one of the defendants.<sup>2</sup> It has been held that the holder of a fund who is already a party to a suit in chancery brought by one claimant against the other to settle the right to the fund ought to apply by petition in that suit for leave to pay the fund into court and not resort to a bill of interpleader.<sup>3</sup> When a bill of interpleader is necessary to determine conflicting claims of creditors, it may be maintained by one of the creditors as well as by the debtor. Thus, such a bill may be maintained to determine conflicting claims against a county for one-half of a fine to which a person is entitled who makes complaint and carries on a certain prosecution.<sup>4</sup> The jurisdiction in equity is not ousted by statutes providing for adequate relief upon motion in an action at law.<sup>5</sup> A person ought not to be made a defendant who asserts no positive claim to the subject-matter of the suit, but merely withholds his consent to its transfer to another claimant.<sup>6</sup>

§ 143. The same subject continued — Complainant's interest.— A bill of interpleader is not a proper remedy when the complainant has any personal interest in the question to be settled,<sup>7</sup> or, to speak more accurately, an interest in the

<sup>1</sup> Richards v. Salter, 6 Johns. Ch. 445.

<sup>2</sup> Newhall v. Kastans, 70 Ill. 156; Richards v. Salter, 6 Johns. Ch. 445; Gibson v. Goldthwaite, 7 Ala. 281; Dungey v. Angove, 2 Ves. 310; Duke of Bolton v. Williams, 2 Ves. Jr. 152; East India Co. v. Edwards, 18 Ves. 377.

<sup>3</sup> Badeau v. Rogers, 2 Paige, 209. But see Birch v. Corbin, 1 Cox, Eq. 144.

<sup>4</sup> Webster v. Hall, 60 N. H. 7. But there must not be several objects of controversy without a common interest. There must be a common fund to serve as the focus of conflicting interests. Wallace v. Sortor, 52 Mich. 159.

<sup>5</sup> Foster's Federal Practice (2d ed.),

§ 88; Wood v. Swift, 81 N. Y. 31, 35; Barry v. Mutual Life Ins. Co., 58 N. Y. 536; Board of Education v. Scoville, 18 Kan. 17, 30.

<sup>6</sup> 2 Daniell's Ch. Pr. (5th ed.) 1564; Desborough v. Harris, 5 De G., M. & G. 439, 455; Jones v. Farrell, 1 De G. & J. 208; Symes v. Magnay, 20 Beav. 47. Cf. Fenn v. Edmonds, 5 Hare, 814. "The filing of bills of interpleader ought not to be encouraged, and they should never be brought except in cases where the complainant can in no other way protect himself from an unjust litigation in which he has no interest." Per Chancellor Walworth in Bedell v. Hoffman, 2 Paige, 199, 201. See, also, Greene v. Mumford, 4 R. I. 313.

<sup>7</sup> Lozier v. Van Saun, 3 N. J. Eq.

particular suit; for a mere collateral interest in the result, as affecting property not directly involved, will not defeat the complainant.<sup>1</sup> He cannot sustain the suit if he is obliged to admit that as to either of the defendants he is a wrong-doer.<sup>2</sup> He must not be under any liabilities to either of the defendants beyond those which arise from the title to the property in contest.<sup>3</sup> And "not only must he be disinterested when he brings his bill, but he must continue to be disinterested. His position must be one of continuous impartiality."<sup>4</sup> On a bill of interpleader to determine who was entitled to the proceeds of a certain note, it appeared that one defendant claimed the note as a gift from a decedent of whom complainant was administrator, and had placed it in complainant's hands to be collected and applied to a debt due from such defendant to complainant. The other defendants claimed that the note belonged to the estate of decedent, who was their mother. It was held that complainant had such an interest in the pro-

825; Story's Equity Pleading (10th ed.), § 297; 2 Daniell's Ch. Pr. (5th ed.) 1560.

<sup>1</sup> *Oppenheim v. Leo Wolf*, 3 Sandf. Ch. 571.

<sup>2</sup> *Shaw v. Coster*, 8 Paige, 889; *Laing v. Zeden*, L. R. 9 Ch. App. 786; 2 Daniell's Ch. Pr. (5th ed.) 1566.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1560.

If he has claimed an interest he may withdraw it before interpleader order. *Adams v. Dixon*, 19 Ga. 518; *Atkinson v. Manks*, 1 Cowen, 691; *Jacobson v. Blackhurst*, 2 J. & H. 486; *Fairbanks v. Belknap*, 135 Mass. 179; *Third National Bank v. Skillings Lumber Co.*, 132 Mass. 410; *Killian v. Ebbinghaus*, 110 U. S. 568. See *Bechtel v. Sheaffer*, 117 Pa. St. 555, containing a full discussion of the nature of interpleader, where it was said:—"As a general rule the party seeking relief by an interpleader must not have incurred any independent liability to either of the rival claimants. If he has expressly acknowledged the title or right of one

of them and agreed to hold the property for him, or, disregarding the adverse claim of one, has by contract made himself liable in any event to the other, he cannot be said to stand indifferent between them." Quoted and approved in *De Zouche v. Garrison*, 140 Pa. St. 480, 486. In *National Life Ins. Co. v. Pingrey*, 141 Mass. 411, 414, the court said:—"A plaintiff cannot have an order that the defendants interplead when one important question to be tried is whether by reason of his own act he is under a liability to each of them." Citing *Cochrane v. O'Brien*, 2 J. & Lat. 880; *Desborough v. Harris*, 5 De G., M. & G. 439; *Baker v. Bank of Australia*, 1 C. B. (N. S.) 511.

<sup>4</sup> *Wing v. Spaulding* (Vt.), 28 Atl. Rep. 615, affirming the general rule that the complainant must occupy the position of a mere stakeholder, and that it is of the very essence of his right that he be entirely indifferent between the conflicting claims.

ceeds of the note that he could not maintain the bill.<sup>1</sup> The seller of goods sued for the price of them, and garnished a warehouse keeper with whom they had been stored. In the meantime defendant's wife sued the warehouseman, who had sold the goods without notice to the owner, and had judgment. In her suit the garnishee failed to plead the garnishment proceeding, but after judgment he asked that plaintiff in the suit against the husband should be compelled to interplead with the wife as to the sum recovered by her. His application was denied, as it was too late, and he was not a mere stakeholder.<sup>2</sup> Where a bill was dismissed on appeal, on the ground of complainant's interest, no costs were allowed in the appellate court to the defendant, who knew of the interest but did not disclose it.<sup>3</sup>

**§ 144. Requisites of a bill of interpleader — Disclaimer of interest.**—In a bill of interpleader it is necessary to aver that the complainant has no interest in the subject-matter of the suit; he must admit title in the claimants and aver that he is indifferent between them.<sup>4</sup> He cannot seek relief in the premises against either of them,<sup>5</sup> nor after the bill is filed assert a right in himself to the fund in dispute.<sup>6</sup> "Interest or want of interest is not a mere formal objection, but goes to the very right of maintaining the bill."<sup>7</sup> Accordingly it was held in the case cited that it was open to the defendant to show at the hearing that the suit was not one proper for requiring the defendants to interplead. He was not precluded

<sup>1</sup> *Wing v. Spaulding* (Vt.), 23 Atl. Rep. 615.

<sup>2</sup> *De Zouche v. Garrison*, 140 Pa. St. 480; s. c., 21 Atl. Rep. 450.

<sup>3</sup> *Wing v. Spaulding* (Vt.), 23 Atl. Rep. 615.

<sup>4</sup> *Killian v. Ebbinghaus*, 110 U. S. 568, 571; *Langston v. Boylston*, 2 Ves. Jr. 101; *Angell v. Hadden*, 15 Ves. Jr. 244; *Mitchell v. Hayne*, 2 Sim. & Stu. 68; *Aldrich v. Thompson*, 2 Bro. Ch. 149; *Metcalf v. Hervey*, 1 Ves. 248; *Bedell v. Hoffman*, 2 Paige, 199; *Atkinson v. Mauks*, 1 Cowen, 191; *State Ins. Co. v. Gennett*, 2 Tenn.

Ch. 88; *Lincoln v. Rutland & C. R. Co.*, 24 Vt. 639; *Moore v. Usher*, 7 Sim. 888; *Diplock v. Hammond*, 2 S. & G. 141; *Wing v. Spaulding* (Vt.), 23 Atl. Rep. 615.

<sup>5</sup> *Killian v. Ebbinghaus*, 110 U. S. 568, 571; *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, 2 Paige, 209; *Story's Equity Pleading* (10th ed.), § 295, and the cases cited in the preceding note.

<sup>6</sup> *Anderson v. Wilkinson*, 10 Sm. & M. 601.

<sup>7</sup> *Wing v. Spaulding* (Vt.), 23 Atl. Rep. 615.

by not objecting by demurrer, nor on motion to pay the money into court.<sup>1</sup>

**§ 145. Affidavit of no collusion in interpleader.**—The complainant must annex to his bill an affidavit that there is no collusion between him and any of the defendants, and that the bill is filed of his own accord for relief,<sup>2</sup> otherwise it is ground for demurrer;<sup>3</sup> and it has been said that it may be taken advantage of at the hearing.<sup>4</sup> The affidavit may be sworn before the bill is actually filed.<sup>5</sup> All the complainants should join in it, and the affidavit of the complainants' solicitor is not generally sufficient.<sup>6</sup> Where the bill is filed by an officer of a company on behalf of the company, he must not only swear that he does not collude, but also, to the best of his knowledge and belief, the company does not collude with either of the defendants.<sup>7</sup> The court gives credit to the affidavit, and will not allow it to be overthrown before the hearing by a counter-affidavit.<sup>8</sup>

<sup>1</sup> *Wing v. Spaulding* (Vt.), 23 Atl. Rep. 615. See, also, *Toulmin v. Reid*, 14 Beav. 499; *Statham v. Hall*, 1 Turn. & R. 80; *Yates v. Tisdale*, 8 Edw. Ch. 71; *Turnpike Co. v. Ferree*, 17 N. J. Eq. 117.

<sup>2</sup> *Shaw v. Coster*, 8 Paige, 889; *Foster's Federal Practice* (2d ed.), § 88; *Gibson's Suits in Equity*, § 718; 2 *Daniell's Ch. Pr.* (5th ed.) 1562; *Story's Equity Pleading* (10th ed.), § 291. Objection to the form of affidavit should be taken by demurrer. *Hamilton v. Marks*, 5 De G. & S. 638. By the Connecticut practice no affidavit of collusion is required. *Nash v. Smith*, 6 Conn. 421.

<sup>3</sup> *Shaw v. Coster*, 2 Edw. Ch. 405; *Metcalf v. Hervey*, 1 Ves. Sr. 248; *Farley v. Blood*, 80 N. H. 854; *Gibson v. Goldthwaite*, 7 Ala. 281; *Blue v. Watson*, 59 Miss. 619.

<sup>4</sup> *Mount Holly &c. Co. v. Ferree*, 17 N. J. Eq. 117. But *Cobb v. Rice*, 180 Mass. 281, holds this to be a formal objection which is waived by going

to a hearing upon the merits. See, also, *Daniel v. Fain*, 5 Lea, 258.

<sup>5</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1562; *Braithwaite's Pr.* 27. But see *Francome v. Francome*, 18 W. R. 855.

<sup>6</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1562; *Wood v. Lyne*, 4 De G. & S. 16. But where the complainants were abroad the solicitor's affidavit was allowed for the purposes of injunction. *Larabrie v. Brown*, 1 De G. & J. 204; s. c., 28 Beav. 607.

<sup>7</sup> *Story's Equity Pleading* (10th ed.), § 297; 2 *Daniell's Ch. Pr.* (5th ed.) 1562; *Gibson's Suits in Chancery*, § 718.

<sup>8</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1563; *Manley v. Robinson*, L. R. 4 Ch. 347; *Langston v. Boylston*, 2 Ves. Jr. 101, 110; *Hamilton v. Marks*, 5 De G. & S. 638, 648; *Story's Equity Pleading* (10th ed.), § 291. Where the plaintiff stated under oath that there was no collusion between himself and either of the defendants, and an order was made requiring the de-

**§ 146. Offer to bring the fund into court in interpleader.** As a general rule the party filing a bill of interpleader must offer by the bill to bring the money or thing in controversy into court.<sup>1</sup> And if an injunction be asked for it will only be granted on condition of his complying with such offer.<sup>2</sup> If an injunction is wanted it would only seem to be necessary to make the offer in the bill and be in readiness and able to comply with it whenever the court shall direct.<sup>3</sup> If land be the matter in dispute, proper conveyances ought to be in readiness for delivery when the bill is filed, or the court may order them to be filed subject to further order.<sup>4</sup> Objections that the bill is irregular in waiving the oath of the defendants, and in not annexing an affidavit that there was no collusion between the plaintiff and either of the parties, that the plaintiff did not bring the property in controversy into court, and did not set out the respective claims of the defendants, and that after the defendants had interpleaded no replication was filed, are all formal objections which should be taken by demurrer, and are waived by going to a hearing upon the merits.<sup>5</sup>

**§ 147. Character of defendants' claims in bills of interpleader.**—Bills of interpleader do not ordinarily lie, except in cases of privity of some sort between all the parties; such as privity of estate, or title or contract, and where the claim

defendants to interplead, evidence to prove collusion could not be received after the making of such order. *Fahie v. Lindsay*, 8 Oregon, 474.

<sup>1</sup> *Shaw v. Coster*, 2 Edw. Ch. 405; *Mohawk &c. R. Co. v. Clute*, 4 Paige, 384; *Story's Equity Pleading* (10th ed.), § 297; *Earl of Thanet v. Paterson*, Barnard. 247; s. c., 2 Ves. Jr. 108; *Hyde v. Warren*, 19 Ves. 322, 323; *Bignold v. Audland*, 11 Sim. 23; 2 Daniell's Ch. Pr. (5th ed.) 1563; *Parker v. Barker*, 42 N. H. 78, 96; *McGarnah v. Prather*, 1 Black, 299. By the practice in Connecticut this is unnecessary. *Nash v. Smith*, 6 Conn. 421. The omission of the offer does not render the bill demurrable.

*Williams v. Wright*, 20 Tex. 499; *Meux v. Bell*, 6 Sim. 175.

<sup>2</sup> *Shaw v. Coster*, 2 Edw. Ch. 405; *Richards v. Salter*, 6 Johns. Ch. 445; *Biggs v. Kowna*, 7 Dana, 410; *Fowler v. Lee*, 10 Gill & J. 358. The fund must be brought into court before any order will be made in the cause. 2 Daniell's Ch. Pr. (5th ed.) 1563.

<sup>3</sup> *Shaw v. Coster*, 2 Edw. Ch. 405. *Williams v. Walker*, 2 Rich. Eq. 291, holds that the complainant should obtain an order and bring the money into court before proceeding further. Where the claim is for goods their value may be brought in. *Burnett v. Anderson*, 1 Mer. 405.

<sup>4</sup> *Farley v. Blood*, 30 N. H. 354.

<sup>5</sup> *Cobb v. Rice*, 180 Mass. 231.

by all is of the same nature and character. Where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the bill cannot be maintained. Thus, if an estate is put up for sale at auction, and A. becomes the purchaser and pays his deposit; and then by order of the same owner it is set up again for sale, and B. becomes the purchaser and pays his deposit, such a case is not a proper case of interpleader if each demands his deposit from the stakeholder, for A. and B. do not claim in privity and their deposits are distinct.<sup>1</sup> The rule finds an apt illustration in the case of a tenant, who can only interplead those persons who claim rent in privity of contract or tenure, as where the conflict is between the original lessor and one claiming the rent as assignee. But if a stranger claims under title paramount there is an absence of privity, and the suit cannot be maintained.<sup>2</sup> Nor can a party interested in the title to realty, and claiming to hold the legal title, file a bill to compel third persons to interplead for his benefit.<sup>3</sup> An agent who has collected money for his principal is not so far an implied trustee as that he can interplead his principal and a third person who is an adversary claimant.<sup>4</sup> The bill will not lie by a debtor against his creditor and a third person who claims the debt, not through any privity with the creditor, but by a title paramount and adverse to his;<sup>5</sup> nor by a sheriff who has seized property upon execution to determine whether the execution debtor or a third person claiming it is entitled to the property, as their claims against him are not of the same character or in the same right.<sup>6</sup> Where plaintiff sued defendant for a broker's commission for the sale of certain land, made through their agency, the action by a third person against defendant in another court to recover for "work, labor and services" in the sale of the land is not "a demand against him for the same debt"

<sup>1</sup> Story's Equity Pleading (10th ed.), § 293; <sup>2</sup> Daniell's Ch. Pr. (5th ed.) 1564; Gibson's Suits in Equity, § 715; Glyn v. Duesbury, 11 Sim. 189, 148; City Bank v. Bangs, 2 Paige, 570.

<sup>3</sup> Snodgrass v. Butler, 54 Miss. 45.

<sup>4</sup> Padgett v. Baker, 1 Tenn. Ch. 222.

<sup>4</sup> Snodgrass v. Butler, 54 Miss. 45, 49. See, also, Dodd v. Bellows, 29 N. J. Eq. 127; Crawshaw v. Thornton, 2 M. & C. 28; Pearson v. Cardon, 2 R. & M. 606, 607, 610.

<sup>5</sup> Third Nat. Bank v. Skillings Lumber Co., 182 Mass. 410.

<sup>6</sup> Shaw v. Coster, 8 Paige, 339.

within the New York Code, allowing an order of interpleader when competing creditors demand "the same debt."<sup>1</sup>

**§ 148. Description of defendants' claim in bills of interpleader.**—In a bill of interpleader the claims should be specifically set forth, so that they may appear to be of the same nature and character, and the fit subject of a bill of interpleader.<sup>2</sup> "The complainant in an interpleading bill must show that he is ignorant of the rights of the respective parties who are called upon by him to interplead; or that at least there is some doubt, in point of fact, to which claimant the debt or duty belongs. And therefore if the complainant states a case in his bill which clearly shows that one defendant is entitled to the debt or duty, and that the other is not, both defendants may (and should) demur."<sup>3</sup> The complainant sets out the claims as exhibited to him, and he cannot be expected to do it with as much particularity as the defendants themselves might do. It is enough for him to satisfy the court that there are opposing claims against which he is in equity entitled to protection until they are settled so that he may pay with safety.<sup>4</sup> In other words, he does not set out the *case* of the claimants, but he states only the *claim* made to him.<sup>5</sup>

<sup>1</sup> Taylor v. Satterthwaite (1893), 22 N. Y. Supl. 187, where it was also held that the granting of an order of interpleader is within judicial discretion, and the order will not be disturbed unless the discretion was improperly exercised.

<sup>2</sup> A bill which stated that G. claimed to be administrator of C., and to be therefore entitled to a certain fund, and also that he claimed an interest in such fund, without stating what that interest was or how it was obtained, was dismissed, because the claim was not specifically set forth. Varrian v. Berrien, 42 N. J. Eq. 1.

<sup>3</sup> Shaw v. Coster, 8 Paige, 389; Parker v. Barker, 42 N. H. 93; Mohawk &c. R. Co. v. Clute, 4 Paige, 384; Briant v. Reed, 14 N. J. Eq. 272.

<sup>4</sup> Lozier v. Van Saun, 8 N. J. Eq. 825. Where a bill of interpleader was brought, but could not be sustained as such upon the facts, yet as enough was alleged to enable the court to see what were the rights of the parties, it was held that the proper relief should be granted under the prayer for general relief. Hollister v. Lefevre, 85 Conn. 456. See, also, Stevens v. Warren, 101 Mass. 564; Muldoon v. Muldoon, 188 Mass. 111.

<sup>5</sup> Briant v. Reed, 14 N. J. Eq. 272. See, also, Gibson's Suits in Equity, §§ 714, 715. A bill of interpleader, under the English practice, must admit a definite thing or sum to be due from the plaintiff; but even if this rule prevails in Connecticut, which is doubtful, the want of such



§ 149. Bills in the nature of interpleader.—There are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons.<sup>1</sup> In such cases the complainant seeks relief for himself, whereas in an interpleader bill, strictly so called, the plaintiff asks only that he may be at liberty to pay the money, or deliver the property to the party to whom it of right belongs, and may therefore be protected against the claims of both.<sup>2</sup> But a bill in the nature of a bill of interpleader cannot be maintained unless the relief sought is equitable relief.<sup>3</sup> A vendee of personal property may file such a bill against his vendor and a third person who claims the property, praying a decree upon their titles, that he may be secure in the payment of the purchase-money.<sup>4</sup> So a mortgagor may bring before the court persons asserting conflicting claims to the mortgage money, and have a decree for redemption which will enable him to pay the money safely.<sup>5</sup>

an admission may there be waived by an omission to take the objection until after the hearing. *Consociated Presbyterian Soc. v. Staples*, 28 Conn. 544. On a bill of interpleader the plaintiffs are in general entitled to their costs out of the fund. Where the money is not brought into court they must pay interest upon it. *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268. Upon a bill of interpleader filed by underwriters against the different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debts, some on the ground of special liens, and others under the assignment in insolvency, the rights of the respective parties will be determined. But, on such a bill, those of the co-defendants who fail in establishing any right to the fund are not entitled to an account, from the defendant whose claims are allowed, of the amount and origin of those claims. *Spring v. South Carolina Ins. Co.*, *supra*.

<sup>1</sup> Story's Equity Pleading (10th ed.), § 297b; <sup>2</sup> Daniell's Ch. Pr. (5th ed.) 1571.

<sup>3</sup> *Bedell v. Hoffman*, 2 Paige, 199; 2 Daniell's Ch. Pr. (5th ed.) 1571. "In strict actions of interpleader legal rights are only enforced, in actions in the nature of interpleader equitable relief in addition is sometimes given, and that seems to be the whole of the distinction." *New England Mut. L. Ins. Co. v. Odell*, 50 Hun, 279, 280. Where the sum which the plaintiff is willing to pay is not the sum which the defendants claim, it is fatal to the maintenance of the action. *Baltimore &c. R. Co. v. Arthur*, 90 N. Y. 285.

<sup>4</sup> *Killian v. Ebbinghaus*, 110 U. S. 568; *Conley v. Alabama G. L. Ins. Co.*, 67 Ala. 472.

<sup>5</sup> *Darden v. Burns*, 6 Ala. 363; Story's Equity Pleading (10th ed.), § 297b.

<sup>6</sup> Story's Equity Pleading (10th ed.), § 297b; *Owen v. Apel*, 68 Ill. 891; 2 Paige, 570.

§ 150. **Bills to perpetuate testimony.**—The object of a bill to perpetuate testimony is to assist other courts, and to preserve evidence to prevent future litigation.<sup>1</sup> It must state the subject-matter touching which the plaintiff is desirous of giving evidence. Thus if the object of the bill is to perpetuate the testimony of the witnesses to a deed respecting real estate, the deed should be properly described, and the names of the witnesses who are to prove the same be set forth.<sup>2</sup> It must show that the plaintiff has some interest in the subject-matter. The title of the plaintiff ought to be plainly, yet succinctly, stated, and that with all necessary and convenient certainty as to the material facts, and as to the time, place, manner and other incidents.<sup>3</sup> A mere expectancy is not a sufficient interest, but a vested interest will suffice to maintain the bill, however trifling in value, whether it be absolute or contingent, present or future in enjoyment.<sup>4</sup> The bill must also show that the defendant has or pretends to have an interest in the subject-matter of the testimony.<sup>5</sup> It must also show some ground of necessity for perpetuating the evidence, as, for instance, that the testimony of a witness may be lost by his death or departure from the country, in which case it is prudent to annex an affidavit of the circumstances.<sup>6</sup> The bill should pray leave to examine witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated, and also proper process of subpoena.<sup>7</sup> If the bill prays for relief it will be dismissed; these being distinct subjects which cannot be joined.<sup>8</sup> But the plaintiff may be allowed to amend by striking out the relief.<sup>9</sup> If the plaintiff neglects to proceed with the suit the defendant cannot move to dismiss for want of prosecution; but he may move that the plaintiff be ordered to take the next step, within a limited

<sup>1</sup> Story's Equity Pleading (10th ed.), § 300; Cooper's Eq. Pl. 52; Barton's Suits in Equity, 53, 54.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 300.

<sup>3</sup> Jerome v. Jerome, 5 Conn. 357.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 301.

<sup>5</sup> Jerome v. Jerome, 5 Conn. 352; Story's Equity Pleading (10th ed.), § 302.

<sup>6</sup> Story's Equity Pleading (10th ed.), §§ 303, 304.

<sup>7</sup> Story's Equity Pleading (10th ed.), § 306.

<sup>8</sup> Jerome v. Jerome, 5 Conn. 353. See Commercial Ins. Co. v. McLoon, 14 Allen, 351.

<sup>9</sup> Vaughan v. Fitzgerald, 1 Sch. & Lef. 316.

time, or to pay him the costs of the suit.<sup>1</sup> The bill is never brought to a hearing;<sup>2</sup> but when the witnesses have been examined the cause is at an end, and if the defendant has not examined any witnesses in chief (as he is entitled to do), he may then obtain, on motion of course, an order for his costs to be paid by the plaintiff; but if he examines witnesses in chief, he is not entitled to any costs.<sup>3</sup>

**§ 151. Bills of certiorari.**—The object of a bill of *certiorari* (which is rarely, if ever, used in America) is to remove a suit in equity pending in some inferior court into the court of chancery, or into some other proper superior court of equity (if any such there be), on account of some alleged incompetency of the inferior court or some injustice in its proceedings. This species of bill having this sole object merely prays the writ of *certiorari*. The bill first states the proceedings in the inferior court; it then states the cause of the incompetency of the inferior court by suggesting that the cause is out of its jurisdiction, or that the witnesses live out of the jurisdiction, or that the defendants live out of the jurisdiction, and are not able, by age or infirmity, or the distance of the place, to follow the suit there; or that for some other cause equal justice is not likely to be done there; and it then prays a writ of *certiorari* to certify and remove the record and the cause to the superior court. It does not pray that the defendant may answer or even appear to the bill, and consequently it prays no writ of subpoena, although a subpoena must be sued out and served. When the cause is removed from the inferior court, the bill exhibited in that court is considered as an original bill in the court of chancery or other superior court, and is proceeded upon as such.<sup>4</sup>

**§ 152. Rules in the federal courts regulating amendments.**—“The plaintiff shall be at liberty, as a matter of

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1573.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1573.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1574.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 298. The bill is filed by the defendant, not by the plaintiff; nor can it be filed after a decree in the

inferior court. And if there is any doubt as to the fact whether the decree in the inferior court was pronounced before the filing or not, the court will refer it to the master to inquire into that fact and certify it to the court. Cooper's Eq. Pl. 50, 51.

course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point, as he may do of course, after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him with a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous he shall furnish in like manner to the defendant a copy of the whole bill as amended, and if there be more than one defendant a copy shall be furnished to each defendant affected thereby."<sup>1</sup> Another rule provides for obtaining an order to amend after answer, plea or demurrer and before replication, as well as after replication but before plea or demurrer is allowed.<sup>2</sup> It is further provided that "if the plaintiff so obtaining any order to amend his bill after answer, or plea or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made."<sup>3</sup> "No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct."<sup>4</sup> If a demurrer or plea is allowed, the court may permit the complainant to amend within its discretion upon such terms as it shall deem reasonable.<sup>5</sup>

<sup>1</sup> Equity Rule 28. As to amendments after an insufficient answer, see *Chase v. Dunham*, 1 Paige, 572.

<sup>2</sup> Equity Rule 29. *Mercantile National Bank v. Carpenter*, 101 U. S. 567; *Neale v. Neale*, 9 Wall. 1.

<sup>3</sup> Equity Rule 30.

<sup>4</sup> Equity Rule 45, for a construction of which see *Wilson v. Stotley*, 4 McLean, 275.

<sup>5</sup> Equity Rule 85.

**§ 153. How amendments are made.**— Amendments are either made by interlineations or by insertions in the margin, if short, or by being separately engrossed and annexed to the original bill. If they are of such a nature as to require the original bill to be re-engrossed, they must then be designated in some way sufficient to point them out to the defendant.<sup>1</sup> “By annexing the engrossed amendments to the original bill, and by referring in that part of the bill where the amendments should have been inserted to the annexed amendments, and by referring at each amendment to the proper place for its insertion in the original bill, the record will be kept from being defaced, and all the requisite certainty and convenience will be obtained.”<sup>2</sup> Upon an application to amend an injunction bill the proposed amendments should be attached to the petition and sworn to. It is not enough to swear to the petition without deposing to the truth of the amended matter.<sup>3</sup> It seems that the complainant and not his solicitor ought to swear to the truth of proposed amendments, and that the information upon which the new matter is founded has come to his knowledge since the filing of the original bill.<sup>4</sup>

**§ 154. Effect of amendments.**— Amendments to a bill have the same effect in the ultimate determination of the cause as if they had been originally inserted.<sup>5</sup> When properly allowed they take effect as of the filing of the original bill.<sup>6</sup> The allow-

<sup>1</sup> *Luce v. Graham*, 4 Johns. Ch. 170, 172. In *Pierce v. West*, 8 Wash. (C. C.), an amended bill was held impertinent for incorporating an unreasonable amount of the original, thus increasing the cost and producing inconvenience to the defendant.

<sup>2</sup> *Luce v. Graham*, 4 Johns. Ch. 170, 173. A slight clerical error in a bill may be amended by interlineation. *Ayers v. Valentine*, 2 Edw. Ch. 451. An amendment to a bill made by an interlineation with different ink from that in which the bill is written needs no foot-note to explain it. *Werborn v. Austin*, 82 Ala. 498. In amending it is not correct to state in

the body of the bill, “and your orator by way of amendment, etc., sheweth.” *Grim v. Wheeler*, 8 Edw. Ch. 448.

<sup>3</sup> *Rogers v. De Forest*, 8 Edw. Ch. 171.

<sup>4</sup> *Verplank v. Mercantile Ins. Co.*, 1 Edw. Ch. 46. A sworn bill may be amended in its prayer, and by adding a new and proper party complainant, without swearing to the amendment. *Livingston v. Marshall*, 82 Ga. 281; s. c., 11 S. E. Rep. 542.

<sup>5</sup> *Hoyt v. Smith*, 28 Conn. 467, 471.

<sup>6</sup> *Fisher v. Moog*, 89 Fed. Rep. 665, 667; *Hurd v. Everett*, 1 Paige, 124; *Adams v. McPhillips*, 82 Ala. 102. It

ance of trivial amendments to the bill on the hearing to cause it to conform to unimportant facts brought out by defendant's testimony, or judicially known to the court, is not ground for continuing a cause, as such amendments could not require new pleadings by defendant.<sup>1</sup> Where an injunction bill is amended on leave, the injunction continues in force although the order granting leave is silent on the subject.<sup>2</sup> Upon a mere amendment of the complainant's bill, no new subpoena is necessary except to bring in new defendants who are made parties by the amendment.<sup>3</sup>

**§ 155. Amendments confined to what matters.**— All matters which arose previous to the filing of the original bill, although discovered afterwards, should be introduced into the same by way of amendment if the cause is in a stage in which an amendment is allowable.<sup>4</sup> As a general rule a bill cannot

was held in Alabama that an amendment alleging a contemporaneous part payment to take a case out of the statute of frauds would relate back to the original filing of the bill, though the effect was to take complainant's demand out of the bar of limitations. *Adams v. Phillips*, 75 Ala. 461. But see *Story's Equity Pleading* (10th ed.), § 887, note *a*; *Weldon v. Neal*, 19 Q. B. D. 894; *Judson v. Courier Co.*, 25 Fed. Rep. 705; *Winston v. Mitchell* (Ala.), 9 So. Rep. 551. Where a complainant amends his bill by inserting an allegation that it is filed in behalf of himself and of all others standing in the same situation, a person as to whom the right to sue was barred at the time of such amendment, so that he could not have filed a bill himself, cannot come in and claim relief against the defendant upon the decree made upon the amendment. *Cunningham v. Pell*, 6 Paige, 655. After an amendment in a material matter to a bill in chancery, defendant should be allowed a reasonable time to plead, answer or demur, not only to the

amendment but to the amended bill; and one hour and three-quarters was held not a reasonable time. *Davis v. Davis*, 62 Miss. 818.

<sup>1</sup>*Phillips v. Edsall*, 127 Ill. 585; s. c., 20 N. E. Rep. 801.

<sup>2</sup>*Selden v. Vermilya*, 4 Sandf. Ch. 578. See, also, *Read v. Consequa*, 4 Wash. (C. C.) 174, 180.

<sup>3</sup>*Lawrence v. Bolton* (1832), 8 Paige, 294; *Longworth v. Taylor*, 1 McLean, 514; *Equitable Life Ass. Soc. v. Laird*, 24 N. J. Eq. 819; *Angerstein v. Clarke*, 1 Ves. Jr. 250. The practice is otherwise in England when a material amendment is made. *Foster's Federal Practice* (2d ed.), § 165. When a bill to foreclose is amended without service of a copy of the amendment upon defendant, and complainant afterwards asks for the appointment of a receiver, an appearance to that motion will not waive defendant's right to a copy of the amendment. *Myers v. Morris* (N. J.), 11 Atl. Rep. 859.

<sup>4</sup>A supplemental bill is necessary for subsequent matter. *Stafford v. Howlett*, 1 Paige, 200; *Candler v.*

be amended for the purpose of stating in it new matters which have occurred subsequent to the commencement of the suit, or of bringing a party before the court whose right or interest in the suit accrued subsequent to the time of filing the original bill.<sup>2</sup> A bill insufficient in itself is not aided by an amendment stating facts which may or may not be subsequent in time to the filing of the bill.<sup>3</sup> Where an executor appointed by a foreign tribunal files a bill in chancery, and subsequently takes out letters of administration in the State where the suit is brought, he must amend his bill so as to state that fact. This is an exception to the general rule that facts which have occurred since the filing of the bill must be brought before the court by supplemental bill and not by way of amendment.<sup>4</sup>

Pettit, 1 Paige, 168. But now not necessary in West Virginia. *Crumlish v. Shenandoah Valley R. Co.*, 28 West Va. 628.

<sup>2</sup>Clark v. Hall, 7 Paige, 386, 403; *Mason v. Hartford &c. R. Co.*, 10 Fed. Rep. 334; *Bannon v. Comegys*, 69 Md. 411; s. c. 16 Atl. Rep. 129; *Killinger v. Hartman*, 21 Neb. 297; *Lyster v. Stickney*, 12 Fed. Rep. 609; *Copen v. Flesher*, 1 Bond, 440. A bill which shows on its face that the plaintiff has before suit assigned all his interest in the matter in controversy is demurrable, nor can an amended bill be filed in the name of the assignee. *Keyser v. Renner's Adm'r*, 87 Va. 249; s. c. 12 S. E. Rep. 406. Where a *feme sole* who should have been made a defendant marries after the commencement of the suit against the other defendants, she cannot be brought before the court with her husband by an amendment of the original bill, but a supplemental bill is necessary. *Campbell v. Bowne*, 5 Paige, 84.

<sup>3</sup>Nichols v. Rogers, 139 Mass. 146. Under Revised Statutes of Missouri, sections 3535, 3573, it is competent in an action against the directors of

a corporation for abuse of their trusts, to file an amended and supplemental petition alleging that the breaches of their trust complained of were then still continued, and the court may render judgment upon matters occurring down to the date of the filing of such amended petition. *Ward v. Davidson*, 89 Mo. 445; s. c. 1 S. W. Rep. 846.

<sup>4</sup>Buck v. Buck, 11 Paige, 170; *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618, 624. But see *Mason v. Hartford &c. R. Co.*, 10 Fed. Rep. 334, and for other cases of a like nature with that stated in the text; *Humphreys v. Humphreys*, 8 P. Wms. 348; *Belloat v. Morse*, 2 Hayw. (N. C.) 157. A bill in equity brought by a judgment creditor of a national bank against the bank, which had gone into voluntary liquidation, and its president, alleged fraudulent conversion and dispersion of part of the bank's assets by the president, and sought a discovery, injunction and receiver. An amendment to the bill was afterwards allowed, joining as defendants all the stockholders, some of whom were alleged to have confederated with the president, and to



§ 156. Amendments after demurrer sustained.—Where a demurrer is allowed on account of a mere formal defect in the bill it is a matter of course, except in the case of a sworn bill, to permit the complainant to amend, upon payment of costs, where he asks for that privilege upon the argument of the demurrer.<sup>1</sup> A demurrer was allowed for want of necessary parties with liberty to the complainant to amend on payment of costs.<sup>2</sup> A demurrer to a bill for want of prayer for process and of signature of counsel was sustained with permission to the complainant to amend.<sup>3</sup> But on a “general demurrer for want of equity, amendments are granted only where there is some defect as to parties, or some omission or mistake of a fact or circumstance connected with the substance of the case, but not forming the substance itself.”<sup>4</sup>

have surrendered their stock for assets of the bank, and praying for the enforcement of the individual liability of the stockholders in favor of the original complainant and any other creditors who might join. It was held that the allowance of such amendment was within the discretion of the court; although the remedy by bill in equity to enforce the individual liability of stockholders was given by an act which took effect between the date of the filing of the original bill and the making of the amendment. *Richmond v. Irons*, 121 U. S. 27; s. c., 7 S. Ct. Rep. 788. See *Henry v. Travelers' Ins. Co.*, 45 Fed. Rep. 299.

<sup>1</sup> *Cunningham v. Pell*, 6 Paige, 655; *McElwain v. Willis*, 3 Paige, 505. Where a mere formal objection to the bill was made by demurrer *ore tenus* the complainant was permitted to amend. *Garlick v. Garlick*, 3 Paige, 440. “The right to amend after a demurrer is sustained must rest largely, if not wholly, in the discretion of the court; and while we are not prepared to hold that in no case will the action of the court in such matter be reviewed here, we have no

hesitation in saying that the abuse of this discretion must be made plain to authorize us to do so.” *United States v. Atherton*, 102 U. S. 372.

<sup>2</sup> *Young v. Bilderback* (1834), 3 N. J. Eq. 206. See, also, *Plumley v. Plumley*, 8 N. J. Eq. 511; *Allen v. Turner*, 11 Gray, 486. Amendments to a bill after a demurrer has been sustained, either on the ground of defect in form or for want of equity, are always allowed in Massachusetts, unless sufficient cause is shown to the contrary. *Merchants' Bank v. Stevenson*, 7 Allen, 489.

<sup>3</sup> *Wright v. Wright*, 8 N. J. Eq. 148.

<sup>4</sup> *Seymour v. Long Dock Co.* (1864), 17 N. J. Eq. 169, 172, citing *Lyon v. Tallmadge*, 1 Johns. Ch. 184. In regard to amending a sworn bill, after a demurrer sustained for multifariousness, the court said:—“It is not a matter of course to permit a bill to be amended after the allowance of a demurrer for multifariousness; matter is generally such that it cannot be separated from the residue of the bill. And in this case, as the bill is sworn to, it is contrary to the practice of the court to permit it to be altered by striking out; as such an

If the complainant obtains leave to amend his bill on condition of paying the costs and he amends without paying them, the defendant should avail himself of the irregularity by a motion to dismiss the bill. Filing an answer to the amended bill is a waiver.<sup>1</sup>

**§ 157. Amendments after replication.**—Before the pleadings are brought to a termination, that is, before the issue is finally made up between the parties, amendments, where the pleadings on file have not been sworn to, are permitted with the utmost liberality.<sup>2</sup> “After issue joined, and before the taking of testimony, the complainant will be permitted to withdraw his replication and amend his bill, as his case may require.”<sup>3</sup> But after witnesses have been examined, the time for allowing amendments, except the addition of defendants, or such as do not substantially alter the case, has gone by.<sup>4</sup> Where it is intended to amend a bill, after a replication filed, by the addition of new facts or charges,<sup>5</sup> the proper course is for leave to withdraw the replication and amend.<sup>6</sup> The ma-

amendment to a sworn bill is not allowable except under very special circumstances.” *Swift v. Eckford*, 6 Paige, 22, 29. An amendment to a sworn bill contradicting material allegation was allowed under special circumstances in *Hall v. Fisher*, 8 Barb. Ch. 687. Where, upon demurrer to a bill for injunction and appointment of a receiver, it appears that such bill is not properly verified by the affidavit thereto, it is proper to allow the amendment of such verification. *Shannon v. Fechheimer*, 76 Ga. 86. It is not error to omit giving leave to amend upon dismissing a bill on demurrer, where no amendment improving the bill can be made. *Pickens' Ex'rs v. Kniseley* (West Va.), 15 S. E. Rep. 997. Where, by a ruling on demurrer, a bill is partially dismissed and partially retained, the complainant may amend at any time before final decree. *Lookout Bank v. Sussong* (Tenn.), 18 S. W. Rep. 889.

<sup>1</sup> *Williamson v. Johnson*, 5 N. J. Eq. 587, 618.

<sup>2</sup> “The complainant may vary his case in any way he pleases, however inconsistent with or repugnant to the original bill.” *Seymour v. Long Dock Co.*, 17 N. J. Eq. 169, 171. See, also, *Codington v. Mott*, 14 N. J. Eq. 430, 432.

<sup>3</sup> *Seymour v. Long Dock Co.*, 17 N. J. Eq. 169, 171; *Story's Equity Pleading* (10th ed.), § 887. Applications to amend should be made promptly after the necessity for the amendment has been discovered. *Codington v. Mott*, 14 N. J. Eq. 431.

<sup>4</sup> *Seymour v. Long Dock Co.*, 17 N. J. Eq. 169.

<sup>5</sup> The rule does not apply to amendments by adding parties. *Brattle v. Waterman*, 4 Sim. 125.

<sup>6</sup> 1 *Barber's Ch. Pr.*, p. 214, citing *Carleton v. L'Estrange*, 1 Tur. & Rus. 28; *Thorn v. Germand*, 4 Johns Ch. 363.

teriality of the amendment, and the reason why the matter was not stated before, must be shown and satisfactorily explained.<sup>1</sup>

§ 158. **Amendments after master's report.**— As a general rule amendments of a bill in equity should be made before the report of the facts by a master; but the rule will not be applied to a case where the facts necessary to the amendment can be obtained only upon the hearing before the master, and especially where they are within the knowledge of the opposite party, and his relation to the bill is such that he ought to have voluntarily disclosed them.<sup>2</sup> An amendment of a bill may be allowed after the return of the report of a master, but if new averments are thus introduced as to facts which would not properly be the subject of proof under the original bill, the court should give an opportunity for a new hearing, unless it appears that there was a full inquiry as to such facts and that they are embraced in the report.<sup>3</sup> After a report of a master and exceptions thereto by the defendant sustained, the plaintiff was permitted on terms to amend his bill so as to obviate the ground of exception, introducing a substantially new cause of action; the court being of opinion, under the circumstances of the case, that the laches of the plaintiff had not been so great as to deprive him of the privilege of amending. But the case was reopened, if the defendant should so elect, for a new hearing on the issue made by the amendment.<sup>4</sup>

<sup>1</sup> *Thorn v. Germand*, 4 Johns. Ch. 363.

<sup>2</sup> *Hoyt v. Smith*, 27 Conn. 468. Where an amendment which, under the facts of the case, was proper to have been introduced after the report of the committee, but was not offered until the cause was reserved for advice and remanded, it was accepted upon payment of the costs accruing subsequent to the return of the master's report. *Hoyt v. Smith*, *supra*.

<sup>3</sup> *Camp v. Waring*, 25 Conn. 520.

<sup>4</sup> *Drew v. Beard*, 107 Mass. 64. Where defendant made no offer to

amend for the purpose of pleading limitation until after the hearing before the master, and while the case was before the court, the court's refusal to permit it was held not an abuse of discretion. *Appeal of Ricketts* (Pa.), 12 Atl. Rep. 60. Where the finding of the master as to the time when the sum found due commenced to draw interest was equivocal, no more was allowed than was asked for by the bill, nor was the complainant allowed to amend. *Robinson v. Missisquoi R. Co.*, 59 Vt. 126; *a. c.*, 10 Atl. Rep. 522.

**§ 159. Amendment after publication.**—After the witnesses in a cause have been examined and the proofs closed, no amendment of the bill is allowed except an amendment which is merely formal, and that under very special circumstances. If it becomes necessary in that stage of the suit to add new parties who will have a right to examine witnesses in their defense, the proper course is to bring such new defendants before the court by a supplemental bill;<sup>1</sup> and if amendments are proposed while the taking of testimony is in progress, which would change the issue or introduce new issues, or materially vary the grounds of relief, they must be introduced by supplemental bill.<sup>2</sup> On a bill filed for the specific performance of a contract, an application after the cause was at issue, and after the time limited by the rule to close testimony had expired, to amend the bill by charging that the contract was fraudulent, and asking that it be declared void, was denied.<sup>3</sup> Where a defect in the bill, even though formal, is specifically pointed out in the answer, but notwithstanding the admonition the complainant goes on and files a replication and takes his proofs, he will not be allowed to amend on any terms.<sup>4</sup> But it is a recognized exception to the general rule that if the bill is defective for want of proper parties, the plaintiff will be permitted, after the taking of testimony, to amend by adding the proper parties.<sup>5</sup>

<sup>1</sup> *Bowen v. Idley*, 6 Paige, 46. "It is a settled rule of practice that a bill defective in its charges cannot be amended after publication and cause set down, especially after hearing, by adding new charges. Such defects can only be supplied by a supplemental bill." Chancellor Kent in *Shephard v. Merrill*, 3 Johns. Ch. 423; *Thorn v. Germand*, 4 Johns. Ch. 363, 364.

<sup>2</sup> *Seymour v. Long Dock Co.*, 17 N. J. Eq. 170.

<sup>3</sup> *Codington v. Mott*, 14 N. J. Eq. 430.

<sup>4</sup> *Wilbur v. Collier*, Clarke's Ch. 315. After all the testimony has been taken, it is not error to refuse an

amendment to a bill when there is no evidence to support the new allegations. *Wright v. Dunklin*, 88 Ala. 317; s. c., 3 So. Rep. 597.

<sup>5</sup> *Seymour v. Long Dock Co.*, 17 N. J. Eq. 169. A mere order for a decree, before it is extended in due form and in apt and technical language, is not a final decree, within Revised Statutes of Maine, chapter 77, section 11, providing that a bill in equity "may be amended or reformed, at the discretion of the court with or without terms, at any time before final decree is entered in said cause." *Gilpatrick v. Gilden*, 82 Me. 201; s. c., 19 Atl. Rep. 166.

§ 160. **Amendments at the hearing.**—An amendment which changes the character of the bill ought not generally to be allowed after a case has been set for a hearing, and still less after it has been heard. The reason is that the answer may become inapplicable if such an amendment be permitted.<sup>1</sup> Where the court is not convinced by the proofs that the complainant is entitled to any relief, leave to amend at the final hearing will be refused. If the complainant intended to rely upon the case made by his proofs, application for leave to amend should have been made promptly.<sup>2</sup> But to permit the complainant to amend his bill on final hearing is obviously right where a change in the bill is indispensable to the accomplishment of justice and can be made without the slightest harm or injustice to the defendant.<sup>3</sup> Thus a plaintiff was allowed to amend the prayer of the bill, at the hearing, so as to enable the court, upon the case made by the original bill, to give the relief which the case and proofs justified.<sup>4</sup> Complainant's title stated in a foreclosure bill not being complete, he was permitted, at the hearing, to amend his bill by setting up his title proved in the cause, which, though questioned at the hearing, was not questioned by the answer.<sup>5</sup> Where the

<sup>1</sup> *Tremaine v. Hitchcock*, 23 Wall. 518; *Midmer v. Midmer*, 26 N. J. Eq. 299; *Ogden v. Thornton*, 80 N. J. Eq. 569. In Massachusetts the court has power by express statute to allow an amendment to a bill, either in matter of form or substance, at any stage of the case before the entry of a final decree. *Merchants' Bank v. Stevenson*, 7 Allen, 489.

<sup>2</sup> *Midmer v. Midmer*, 26 N. J. Eq. 299. Whether an amendment of a bill at the final hearing can be allowed, when such amendment consists of facts that falsify materially the facts originally stated, query. *Thornton v. Ogden*, 82 N. J. Eq. 728.

<sup>3</sup> *Ogden v. Thornton*, 80 N. J. Eq. 569, 574. See, also, *Smith v. Sherman*, 52 Mich. 637. "Where a matter has not been put in issue by the bill with sufficient precision, the

court, upon the hearing, has given leave to amend. So the complainant will be permitted, upon the hearing, to amend his prayer for relief or any clerical mistake or misstatement. But neither of these amendments varies the issue between the parties, nor as a general rule do they at all affect the relevancy of the evidence offered." *Seymour v. Long Dock Co.*, 17 N. J. Eq. 169, 172.

<sup>4</sup> *Hardin v. Boyd*, 113 U. S. 756; *Graffam v. Burgess*, 117 U. S. 180; *Morrison v. Kraemer*, 63 Mich. 288; *Codington v. Mott*, 14 N. J. Eq. 481. An allegation that conveyances against which relief is sought "hindered, embarrassed, delayed," etc., may be inserted in the bill by amendment at the final hearing. *Foster v. Knowles*, 42 N. J. Eq. 226.

<sup>5</sup> *Terhune v. Taylor*, 27 N. J. Eq. 80.

*cestui que trust* was made a respondent in a suit by the trustee against a third person for the recovery of the property, an amendment was ordered at the hearing, striking him out as defendant and making him a complainant.<sup>1</sup> A bill to have a mortgage discharged was allowed to be amended to a bill to redeem.<sup>2</sup> Where the complainant, being a corporation, sued by a wrong name, the bill was amended in that respect at the hearing.<sup>3</sup> Where the ground of relief proved is different from that alleged in the bill, but the real truth is not disclosed by the defendant's answer and not discovered until the evidence is nearly closed, it is in accordance with the practice of the court, even at that stage of the cause, to permit an amendment of the bill upon terms, if it be necessary to the ends of justice.<sup>4</sup>

§ 161. Amendments to meet the case proved.—There is a class of cases in which, by recent practice, much liberality of amendment has been allowed. Thus, where upon the final hearing, or even after appeal, it appears clearly from the evidence that the complainant has a case which entitles him to relief, but which by reason of some defect or omission in the charges or allegations of the bill is not brought fairly within the issue, he will be permitted to adapt the allegations of the bill to the case as proven.<sup>5</sup> Where, in a bill to set aside a sheriff's sale, praying for an unconditional reconveyance, the allegations were sufficient to warrant a prayer for leave to redeem, and the proofs supported the bill to that extent, the court allowed the prayer to be amended at the hearing.<sup>6</sup> A complainant was permitted to amend his bill after the master's report by introducing a claim inadvertently omitted, the evidence to support it having been mainly taken, subject to any

<sup>1</sup> *Elmer v. Loper*, 25 N. J. Eq. 475.

<sup>2</sup> *Harrigan v. Bacon*, 57 Vt. 644.

<sup>3</sup> *Hoboken Building Ass'n v. Martin*, 13 N. J. Eq. 427.

<sup>4</sup> *Howell v. Sebring*, 14 N. J. Eq. 90. It is sufficient excuse for laches in not applying for leave to amend an original bill to bring into court a necessary party till the hearing upon bill, answers, and supplemental bill filed for the purpose of bringing in

all parties then thought necessary, that counsel supposed no amendment was necessary; and the court will not, as of course, dismiss such original bill, but may permit the complainant to proceed thereon. *Stover v. Wood*, 26 N. J. Eq. 56.

<sup>5</sup> *Seymour v. Long Dock Co.*, 17 N. J. Eq. 169, 172; *Hampton v. Nicholson*, 28 N. J. Eq. 423.

<sup>6</sup> *Graffam v. Burgess*, 117 U. S. 180.

defense of the defendant and to the additional costs resulting.<sup>1</sup> Another case in the same line was where an amendment was allowed to a bill even after a final decree, the cause having been tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment.<sup>2</sup> Likewise the bill was permitted to be amended after final hearing, so as to make the contract alleged agree with that proved.<sup>3</sup>

§ 162. Amendments changing the ground of action.— Amendments are allowed in equity with great liberality, but, as a general rule, amendments which seek to make a new case inconsistent with that originally made, if allowable at all, should be applied for and made before the cause is at issue.<sup>4</sup> After that time a party cannot be allowed to amend by introducing matter which would constitute a new bill;<sup>5</sup> and this although there may have been an agreement between the parties for the amendment.<sup>6</sup> Under the privilege of amending, a party is not to be permitted to make a new bill. To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily incumbered with the original proceedings, increases expenses and complicates the suit; it is far better to require the complainant to begin anew.<sup>7</sup> It is no ground for de-

<sup>1</sup> *Nellis v. Pennock Mfg. Co.*, 88 Fed. Rep. 379.

<sup>2</sup> *Tremaine v. Hitchcock*, 38 Wall. 518. See, also, *Byers v. Franklin Coal Co.*, 106 Mass. 181; *Horn v. Clements* (N. J.), 8 Atl. Rep. 530; *Van Riper v. Claxton*, 9 N. J. Eq. 302, 306; *Ledos v. Kupfrian*, 28 N. J. Eq. 162; *Hamilton v. Southern & C. Min. Co.*, 83 Fed. Rep. 562; *New York Fire Ins. Co. v. Tooker*, 35 N. J. Eq. 409; *Pond v. Smith*, 4 Conn. 297. But in such case the complainant can have the relief sought only by amendment. *Stevens v. Church*, 41 Conn. 369. See, also, § 160, *supra*. Code of Alabama of 1886, section 3449, allowing amendments to a bill to meet any state of evidence which

will authorize relief, means evidence already taken; and, there being no evidence in the record to support the facts averred in a proposed amendment, it was disallowed. *Beatty v. Brown*, 85 Ala. 209; s. c., 4 So. Rep. 609.

<sup>3</sup> *Davison v. Davison*, 18 N. J. Eq. 246.

<sup>4</sup> *Codington v. Mott*, 14 N. J. Eq. 430; *Walden v. Bodley*, 14 Pet. 156.

<sup>5</sup> *Verplank v. Mercantile Ins. Co.*, 1 Edw. Ch. 45.

<sup>6</sup> *Jones v. Davenport*, 45 N. J. Eq. 77; s. c., 17 Atl. Rep. 570.

<sup>7</sup> *Shields v. Barrow*, 17 How. 180; *Lyon v. Tallmadge*, 1 Johns. Ch. 184; *Jones v. Davenport*, 45 N. J. Eq. 77; *Seborn v. Beckwith*, 30 West Va. 774; s. c., 5 S. E. Rep. 450; Attorney-



murrer that an amendment to the bill simply anticipates the defense. This is not stating a different case from that stated by the bill.<sup>1</sup>

§ 163. Amendments constituting a departure illustrated.— Where a bill contains only a special prayer for relief no other relief can be demanded, and if the facts set forth in the bill would not authorize other relief, the prayer will not be amended.<sup>2</sup> An original bill claimed a resulting trust in favor of complainant, averring that her father furnished money for her benefit to defendant with which to redeem the land, and that he took a conveyance of the legal title to himself. The amended bill averred that complainant's father furnished the money to redeem for his own benefit; that defendant took the legal title to himself, etc.; that her father was dead, and that she was one of his heirs. The amended bill was held to be a radical departure from the case made by the original bill and demurrable for that reason.<sup>3</sup> So also with an amendment to a creditor's bill to redeem land sold at sheriff's sale, so as to make it a bill to enforce a trust alleged to have arisen between complainant and another judgment creditor.<sup>4</sup> In a suit to have a trust deed declared a general assignment for benefit of creditors, and charging that defendant had fraudulently conveyed property to his wife, but not making her a party nor asking relief from her, after the proof was all taken and published an amendment making her a defendant and seeking to have property claimed by her

General v. Birmingham, 15 Ch. D. 425; Pickens v. Knisely, 29 West Va. 1; Minor v. Woodbridge, 2 Root, 277; Hazard v. Hidden, 14 R. I. 356; Dodd v. Astor, 2 Barb. Ch. 895. See, also, Curtis v. Leavitt, 4 Edw. Ch. 246; Snead v. McCoull, 12 How. 407; Whelan v. Sullivan, 102 Mass. 204; Seymour v. Long Dock Co., 17 N. J. Eq. 169, where it was said that such amendments are not allowed "except in the case of infants." In regard to infants see Story's Equity Pleading (10th ed.), 892. An amendment will not be allowed if it appears that, if made, the plaintiff could not sustain his suit. Camp v. Waring, 25 Conn.

520. An old bill in chancery may be so amended by changing the address, the designation of the parties complainant, and the prayer for process as to render it a good petition in the superior court under the new procedure act of Georgia of 1887. De Lacy v. Hurst, 83 Ga. 223; s. c., 9 S. E. Rep. 1052. As to what constitutes a new case, see the following two sections and Wilhelm's Appeal, 79 Pa. St. 120.

<sup>1</sup> Brooks v. Spann, 63 Miss. 198.

<sup>2</sup> Halstead v. Meeker's Executors, 18 N. J. Eq. 186.

<sup>3</sup> Marshall v. Olds, 86 Ala. 296; s. c., 5 So. Rep. 506.

<sup>4</sup> Ward v. Patton, 75 Ala. 207.

and not embraced in the trust deed sold for the husband's debts was disallowed.<sup>1</sup> In an action to foreclose a purchase-money mortgage, where the defendant filed a cross-complaint asking damages for a portion of the land from which he claims to have been ousted, but failed to show that the land taken from him was a part of that described in the conveyance, he had no right on the trial to amend his complaint by setting up a mistake in description in the deed so as to include the land shown to have been taken.<sup>2</sup> Where a suit was brought by an executor after distribution of an estate to construe the will, plaintiff could not by amendment seek to quiet his title as trustee to the land devised, which had been conveyed to him as trustee by the devisee, since such amendment would change both the cause of action and the capacity in which the plaintiff sued.<sup>3</sup> A bill framed on the theory that a trust expired at a certain time, and asking for an account of the trust estate in the hands of the trustees, cannot, after a decision that it had not expired, and that so long as it continued the *cestui que trust*, testator's widow, was entitled to the annuity provided, be amended so as to seek and have complainants' claims as creditors of testator decreed a lien on the property, subject, at most, to the widow's claim of dower, and to have the property sold and divided, the effect of such amendment being to make a new and different case.<sup>4</sup> The original bill to foreclose a mortgage on tangible property, a good-will and a share of stock, and two amended bills, alleged that the tangible property had been destroyed, and it was therefore held that complainant could obtain no relief in that suit. It was decided that leave to file a third amended bill, alleging the existence of the tangible property, for the purpose of reaching the intangible property, should be denied.<sup>5</sup> After the hearing and decision of a suit to have a trust-deed and the sale thereunder annulled as being clouds upon complainant's title, it is within the discretion of the court to refuse

<sup>1</sup> *Parsons v. Johnson*, 84 Ala. 254; *Clason v. Lawrence*, 8 Edw. Ch. 48, s. c., 4 So. Rep. 385. 53.

<sup>2</sup> *Kelly v. Kershaw*, 5 Utah, 295; s. c., 14 Pac. Rep. 804.

<sup>4</sup> *National Bank of Commerce v. Smith (R. I.)*, 24 Atl. Rep. 469.

<sup>3</sup> *Miles v. Strong*, 60 Conn. 393; s. c., 23 Atl. Rep. 959. See, also,

<sup>5</sup> *Metropolitan National Bank v. St. Louis Dispatch Co.*, 38 Fed. Rep. 57.

complainant leave to amend his bill so as to offer to redeem from the trust deed.<sup>1</sup>

**§ 164. Amendments not making a new case illustrated.—** A bill in equity seeking a cancellation of an agreement to sell land and general relief may be amended after hearing by asking that a vendor's lien be declared.<sup>2</sup> A bill asking for reformation of a mortgage and foreclosure thereof may be amended so as to ask for reformation and the removal of a cloud on complainant's title as mortgagee.<sup>3</sup> A complaint to foreclose a mortgage, alleging that complainant was a widow, may be amended to show that she was a married woman living apart from her husband.<sup>4</sup> Where, in an action for specific performance of a contract for the sale of land, the contract set out in the bill described the land as belonging to another than the defendant, an amendment, even after issue joined on a plea, was allowed by paying the taxed costs of the defendant up to that time, alleging that the contract set out did not express the real agreement, and asking to have it reformed and then specifically enforced.<sup>5</sup> An amendment to a bill attacking a fraudulent conveyance, consisting in the addition of a prayer asking that the price of the goods sold by complainants to the fraudulent grantor may be applied to their debt in preference to those of other creditors, does not amount to alleging a new cause of action.<sup>6</sup> Though an original bill by a widow, alleging that defendant fraudulently procured a conveyance of land from complainant, charges the fraud to have been committed by representing that the conveyance would facilitate litigation in which the estate was involved, an amended bill, filed after a demurrer to the original bill is sustained, charging defendant with having misrepresented the nature of the instrument executed by complainant, does not set up such different grounds for relief that it is an abuse of

<sup>1</sup> *Sawyer v. Campbell*, 180 Ill. 186; s. c., 22 N. E. Rep. 458. For similar cases see *Goodyear v. Brown*, 8 Blatch. 266; *Land Co. v. Elkins*, 20 Fed. Rep. 545; *Tyler v. Galloway*, 13 Fed. Rep. 477; *Oglesby v. Attrill*, 14 Fed. Rep. 214; *Smith v. Woolfolk*, 115 U. S. 143, 148; *Earl v. Grove* (Mich.), 52 N. W. Rep. 615.

<sup>2</sup> *Hardin v. Bond*, 118 U. S. 756.

<sup>3</sup> *Hawkins v. Pearson* (Ala.), 11 So. Rep. 304.

<sup>4</sup> *Bolman v. Lohman*, 74 Ala. 507.

<sup>5</sup> *Fearey v. Hayes*, 44 N. J. Eq. 425; s. c., 15 Atl. Rep. 592.

<sup>6</sup> *De Lacy v. Hurst*, 88 Ga. 228; s. c., 9 S. E. Rep. 1052.

discretion to refuse to strike it from the files.<sup>1</sup> Where a bill alleged that certain land was sold to respondent, and that six notes were given for the unpaid purchase-money, and copies of two of the notes, which were averred to have been assigned to complainant for value, and were filed as exhibits, an amendment striking out the averment of assignment, adding a co-complainant, and attaching as exhibits copies of two more notes, which had matured before the bill was filed, did not constitute a new case, and was not a radical departure from the case originally stated.<sup>2</sup> A bill assailing a mortgage executed by a corporation, on the ground of bad faith on the part of the directors in selling the bonds secured thereby, may be amended after issue made by setting up the subsequently discovered fact that, under its charter, the directors of the company were not legally elected, and had no power to cause the mortgage to be executed; as there is nothing inconsistent in the objects of the original and amended bills.<sup>3</sup>

<sup>1</sup> *Jones v. Van Doren*, 180 U. S. 684; 9 S. Ct. Rep. 685. A bill sought to have one of two conveyances set aside on the ground of fraud as to creditors, but alleged that both conveyances were parts of one fraudulent scheme. An amendment to the bill sought to set aside the other conveyance, and made the grantees therein parties. It was held that the amendment was proper, under Alabama Code, sec. 8449, which provides: "Amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief,"—and was not subject to objection that it introduced a new cause of action. *Collins v. Stix* (Ala.), 11 So. Rep. 880. Under the same section a bill in equity praying that a mortgage be canceled and removed as a cloud upon complainant's title, and alleging that the mortgagee is in possession under a judgment recovered in an action of unlawful detainer,

may be amended by an allegation that complainant has appealed from the judgment, and a prayer that the further prosecution of the action by defendant be enjoined. *Freeman v. Brown* (Ala.), 11 So. Rep. 249. See, also, *Winston v. Mitchell* (Ala.), 9 So. Rep. 551.

<sup>2</sup> *Johnson v. Durner*, 88 Ala. 580; s. c., 7 So. Rep. 245.

<sup>3</sup> *Hardie v. Bulger*, 66 Miss. 577; s. c., 6 So. Rep. 186. See for further cases, *Conner v. Smith*, 88 Ala. 800; s. c., 7 So. Rep. 150; *Perea v. Gallegos*, 4 N. Mex. 338; s. c., 20 Pac. Rep. 105; *Tremaine v. Hitchcock*, 28 Wall. 518; *Nellis v. Pennock Mfg. Co.*, 88 Fed. Rep. 879; *Graffam v. Burgess*, 117 U. S. 180; *Hunter v. United States*, 5 Pet. 178; *Reay v. Raynor*, 19 Fed. Rep. 308; *New York Grape Sugar Co. v. Buffalo Grape Sugar Co.*, 29 Fed. Rep. 505; *Hardin v. Boyd*, 113 U. S. 756; *Chicago & C. Ry. Co. v. National Bank*, 184 U. S. 276; *Randolph v. Barrett*, 16 Pet. 188. An application to file an amendment which is harmonious

§ 165. **Miscellaneous matters relating to amendments.**—An irregular amendment of a bill may be waived by parol or by subsequent acquiescence.<sup>1</sup> Affidavits denying the truth of matter proposed to be inserted in a bill by way of amendment form no sufficient objection to the application to amend.<sup>2</sup> Where the court has no jurisdiction of the parties or of the subject-matter it has no authority to make an order permitting the plaintiff to amend his bill by adding proper parties residing within the jurisdiction. The court can make no order whatever in a suit so situated.<sup>3</sup> A bill may be amended by substituting one of the defendants for the plaintiff, who has no interest in the suit.<sup>4</sup> Where, in a bill to reform a deed, there is no allegation that a subsequent purchaser had notice, the plaintiff may be allowed to amend his bill.<sup>5</sup> If a bill defectively states a cause of action, which, notwithstanding the defects, it is apparent should be considered on its merits, the bill should not be dismissed without affording an opportunity to amend.<sup>6</sup> Though a rule to amend is of course, yet the rule must be actually entered with the register. The clerks cannot allow the records to be amended without a certified order for that purpose.<sup>7</sup> An amended bill, filed without leave of the court below and disregarded by it, will not be considered on appeal.<sup>8</sup> And where leave to amend a bill was granted, but no amendment was made, the cause stood on the bill as

with the answer appeals to the favorable discretion of the court. *Maynard v. Tilden*, 28 Fed. Rep. 688, 704. As a general rule a bill of discovery cannot be amended into one for relief, though it has been allowed in some cases. 1 *Daniell's Ch. Pr.* (5th ed.) 408.

<sup>1</sup> *Farmers' Loan & Trust Co. v. Reid*, 3 Edw. Ch. 414.

<sup>2</sup> *Coster v. Griswold*, 4 Edw. Ch. 364.

<sup>3</sup> *Cromwell v. Cunningham*, 4 Sandf. Ch. 384.

<sup>4</sup> *Smith v. Hadley*, 64 N. H. 97; 5 Atl. Rep. 717.

<sup>5</sup> *Cross v. Bean*, 81 Me. 525; s. c., 17 Atl. Rep. 710.

<sup>6</sup> *McKay v. McKay*, 28 West Va.

514. It is proper to refuse to allow a bill to be amended where the nature of the proposed amendment is not shown; and an order refusing leave to amend a bill will not be reversed upon appeal, even though the order was based upon the erroneous theory that the court had no power to allow the amendment, where it appears that the allowance of the amendment, though within the power of the court, would not have been a proper exercise of its discretion. *Campbell v. Powers*, 139 Ill. 128; s. c., 28 N. E. Rep. 1062.

<sup>7</sup> *Luce v. Graham*, 4 Johns. Ch. 170.

<sup>8</sup> *Terry v. McClure*, 103 U. S. 442.

filed.<sup>1</sup> An agreement for the amendment of a pleading amounts to nothing at all until the agreement has been executed by an actual change in the pleading.<sup>2</sup> The defendant has no right to have the complainant amend his bill, nor is it required of him to do so, to expose defects or supposed defects in his case, on motion of the defendant.<sup>3</sup> After a defendant has been brought into court upon an attachment for not answering an amended bill, and has been examined on interrogatories as to the alleged contempt, it is too late for him to object to the regularity of the orders for leave to amend and requiring him to answer the amended bill.<sup>4</sup> A petition, under the Georgia code, to foreclose a mortgage on realty, is "pleading" and is within the statute of amendment.<sup>5</sup> Where the complainant obtains an order for leave to amend his bill upon payment of the costs of the defendant's answer and the costs of opposing the application, he is not compelled to pay the costs of the answer if he elects to proceed without making the proposed amendment; but he must in that case pay the costs of opposing the application to amend.<sup>6</sup> If a party suing *in forma pauperis* amends his bill after answer, under a common order, it must be upon payment of costs as in ordinary suits; and if he has a meritorious claim to amend without costs, he must apply to the court by special motion upon affidavit and notice to the adverse party.<sup>7</sup> Where the complainant files a replication to the answer after he is apprised of the necessity of an amendment to his bill, he precludes himself from making such amendment.<sup>8</sup> In order to sustain a motion to amend the bill after answer, it should appear that the facts proposed to be inserted were not known to the complainant at the time of filing the bill or some excuse should be shown for the omission.<sup>9</sup> A bill cannot be amended by adding new parties in the appellate court, and the record will not be remitted for that object when no purpose of substantial justice will be thereby

<sup>1</sup> Hudnit v. Tomson, 26 N. J. Eq. 239.

<sup>2</sup> Jones v. Davenport, 45 N. J. Eq. 78.

<sup>3</sup> Phelps v. Elliott, 26 Fed. Rep. 881.

<sup>4</sup> Cunningham v. Pell, 6 Paige, 655.

<sup>5</sup> Ledbetter v. McWilliams (Ga.), 15 S. E. Rep. 684.

<sup>6</sup> Van Ness v. Cantine, 4 Paige, 55.

<sup>7</sup> Richardson v. Richardson, 5

Paige, 58.

<sup>8</sup> Vermillyea v. Odell, 4 Paige, 121.

<sup>9</sup> Vermilya v. Odell, 1 Edw. Ch. 617.

answered.<sup>1</sup> After a decree has been rendered, declaring and enforcing a vendor's lien, and the lands have been sold under it, an application to amend the bill, by correcting the numbers of the land, comes too late at a subsequent term.<sup>2</sup> An amendment to a bill, offered before the answer is filed, may be allowed or not in the discretion of the chancellor; and the proper exercise of such discretion will not be disturbed on appeal.<sup>3</sup> An order to amend the bill, obtained before appearance, is regular and valid, although the defendant appears before the amendments are actually prepared.<sup>4</sup>

<sup>1</sup> Cutler v. Tuttle, 19 N. J. Eq. 549. Owen, 2 Pickle (Tenn.), 855; s. c., 7

<sup>2</sup> Owen v. Bankhead, 82 Ala. 899; S. W. Rep. 457.

s. c., 8 So. Rep. 97.

<sup>4</sup> Selden v. Vermilya, 4 Sandf. Ch.

<sup>3</sup> Grange Warehouse Ass'n v. 578.



## CHAPTER V.

### PROCESS FOR APPEARANCE.

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| <p>§ 166. Form of subpoena.</p> <p>167. Issue of a subpoena.</p> <p>168. The same subject continued.</p> <p>169. Return day of a subpoena.</p> <p>170. Who may serve a subpoena.</p> <p>171. Acceptance of service.</p> <p>172. Personal service of a subpoena.</p> <p>173. The same subject continued.</p> <p>174. Service upon corporations.</p> <p>175. Service upon persons under disability — Lunatics, married women, convicts.</p> <p>176. The same subject continued — Infants.</p> <p>177. Substituted service of a subpoena.</p> <p>178. The same subject continued.</p> <p>179. Substituted service in proceedings <i>in rem</i>.</p> | <p>§ 180. The same subject continued.</p> <p>181. Service by publication.</p> <p>182. Preliminary affidavit — Mailing — Amendment of defects — Effect of irregularities.</p> <p>183. Conclusiveness of preliminary affidavit.</p> <p>184. Proof of publication.</p> <p>185. The same subject continued.</p> <p>186. No personal decree on service by publication.</p> <p>187. Return of service.</p> <p>188. The same subject continued — Amendment of return.</p> <p>189. Motion to quash for irregularity.</p> <p>190. Exemption from service of process.</p> |
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§ 166. Form of a subpoena.— A subpoena is a writ issuing out of and under the seal of the court, commanding the defendant, under a penalty therein named, personally to appear in court on a certain day to answer the bill.<sup>1</sup> In the federal courts it is provided that “the process of subpoena shall constitute the mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigencies of the bill.”<sup>2</sup> “All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the

<sup>1</sup> 1 Barbour's Ch. Pr. (2d ed.) 49.

<sup>2</sup> Equity Rule 7. In New Hampshire, where the statute provides that “in any case brought in any court process may be served and notice given by duly attested copy,” a bill in equity may be inserted as a decla-

ration in a writ of summons, and may be served on defendant by giving him a duly attested copy of the writ and declaration. *Haverhill Iron Works v. Hale* (N. H.), 14 Atl. Rep.

clerk thereof. Those issuing from the Supreme Court or a circuit court shall bear teste of the chief justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof.”<sup>1</sup> “All process issued from the courts of the United States shall bear teste from the day of such issue.”<sup>2</sup> “Whenever a bill is filed the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk’s office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of issuing thereof. At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk’s office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there is more than one defendant a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.”<sup>3</sup> All process from the Supreme Court of the United States must be in the name of the president of the United States.<sup>4</sup> And process of subpoena in equity, issuing from that court, must be served on the defendant sixty days before the return day of the process; “and if the defendant, on such service of the subpoena, shall not appear on the return day, the complainant shall be at liberty to proceed *ex parte*.”<sup>5</sup>

<sup>1</sup> U. S. R. S., § 911.

<sup>2</sup> U. S. R. S., § 912; U. S. St. at L. 197.

<sup>3</sup> Equity Rule 12.

<sup>4</sup> Supreme Court Rule 5.

<sup>5</sup> Supreme Court Rule 5. “It is well settled that no persons are parties as defendants to a bill in chancery except those against whom process is prayed, or who are specifically named and described as defendants in the bill. Story’s Equity Pleading, § 44; 1 Daniell’s Ch. Pr. 890; Cooper’s Eq. PL, § 16; Elmendorf v. Delancey, Hopk. (N. Y.) Ch. 555;

Verplanck v. Mercantile Ins. Co., 2 Paige, 438, 449; Bond v. Hendricks, 1 A. K. Marsh. 594; Lyle v. Bradford, 7 Mon. (Ky.) 118. But if a person is specifically named as a defendant, he may be brought into court by process issued against him generally. ‘It is by inspecting the bill,’ said the chancellor in Walton’s Ex’r v. Herbert, 18 N. J. Eq. 78, ‘that the defendant ascertains the nature of the charge against him, and if he be properly charged in the bill as executor or devisee, or in any other capacity, it is not a good objection

§ 167. Issue of a subpoena.— It is irregular to serve a subpoena in a case before the bill has been filed.<sup>1</sup> It is expressly provided by the United States Equity Rules that “No process of subpoena shall issue from the clerk’s office in any suit in equity until the bill is filed in the office.”<sup>2</sup> When the bill is filed the clerk issues process of subpoena thereon as of course upon the application of the plaintiff.<sup>3</sup> But the issue of the subpoena before bill filed is a purely technical irregularity, and is waived by an appearance.<sup>4</sup> In a case where a motion

that the subpoena is issued against him personally.’” *White v. Davis*, 48 N. J. Eq. 22, 24, overruling a demurrer to a bill which duly charged the defendant as a fraudulent assignee for the benefit of creditors, but prayed process without styling him assignee, etc. Where a bill for foreclosure made a certain person defendant as executor and as guardian, and the return to the process showed that he was served as executor and guardian, and the bill stated clearly and distinctly that he had an individual interest in the premises, it was held that a decree of foreclosure was binding upon him in his individual as well as representative capacity. *Cornell v. Green*, 43 Fed. Rep. 105. A defective description of the representative capacity of a defendant in the subpoena which summons him is cured if he is properly described in the bill, and if he appears even by the defective title and answers without objection. *Johnson v. Waters*, 111 U. S. 640. Where a complainant wishes to make an unbaptized infant a party defendant, it seems the subpoena should describe him as the last-born child of A. B. and C. D.—his father and mother. *Eley v. Broughton*, 2 Sim. & Stu. 188.

<sup>1</sup> *Saxton v. Stowell* (1845), 11 Paige, 526. Except in injunctions to stay waste. *Crowell v. Botsford*, 16 N. J. Eq. 458. See, also, *Hayden v. Buck-*

*lin*, 9 Paige, 512. “In common parlance we use the expression ‘filing of the bill’ to denote the commencement of a suit in chancery, instead of referring to the issuing and service of the subpoena, or the making of a *bona fide* attempt to serve it, after the bill has been filed, which is the actual commencement of the suit in this court.” *Fitch v. Smith*, 10 Paige, 9, 11; *Webb v. Pell*, 1 Paige, 564.

<sup>2</sup> Equity Rule 11.

<sup>3</sup> Equity Rule 12. “Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena *toties quoties* against such defendant, if he shall require it, until due service is made.” Equity Rule 14.

<sup>4</sup> *Crowell v. Botsford* (1863), 16 N. J. Eq. 459, where the court said:— “The commencement of a suit in chancery was originally by bill, before issuing a subpoena. The bill contained, as it still does, a prayer for subpoena, which issued as soon as the bill was filed. Gilbert’s ‘*Forum Romanum*,’ 64; 3 Blackstone’s Com. 442–3. Yet in a very early treatise upon the proceedings of the court of chancery, it is stated that ‘notwithstanding the practice before this time hath been that no subpoena should be sued forth of the court of chancery without a bill first exhibited, yet of late, for the ease of all suitors and subjects, it hath been

was made in the Supreme Court for leave to file a bill by a State against General Grant, the practice of that court in all cases of original equity jurisdiction, and which would thereafter be adopted, was declared as follows:—“In cases of equity it has been the usual practice to hear a motion in behalf of the complainant for leave to file the bill, and, leave having been given, subsequent proceedings have been regulated by orders made from time to time as occasion required. The motion for leave has been usually heard *ex parte*; except at the last term, when leave was asked in behalf of the State of Mississippi to file a bill against the President of the United

thought good that every man may have a subpoena out of the same court without a bill first exhibited.’ Tothills’ Proceed. 1. And by Lord Clarendon’s Orders in Chancery, in 1661, it is directed ‘that all plaintiffs may have liberty to take forth subpoenas *ad respondendum* before the filing of their bills, if they please, notwithstanding any late order or usage to the contrary.’ Beames’ Orders in Chancery, 168. This order continued in force until 1705, when it was enacted by statute of Anne (ch. 16, § 23), that ‘no subpoena or any other process for appearance do issue out of any court of equity till after the bill is filed, except in cases of bills for injunction to stay waste, or stay suits at law commenced.’ The statute is equally peremptory with our own, yet it has always been regarded as directory only, and a departure from its requirements a mere irregularity, which subjected the party to costs. In Hinde’s Ch. Pr. 76, it is said that, notwithstanding the statute, ‘solicitors, through ignorance or inattention, frequently sue out and serve this writ before the bill be filed, taking care to file the bill on the return day; yet that practice is altogether irregular (except in cases in the statute excepted), and the complainant does it at the risk of

costs.’ The elementary books all treat the issuing of the subpoena before the filing of the bill, since the passage of the statute, as an irregularity, which exposes the complainant to the hazard of costs. 1 Newland’s Pr. 62; 2 Maddock’s Ch. Pr. 197; 1 Smith’s Ch. Pr. 110; 1 Daniell’s Ch. Pr. 592. The same rule prevailed under the ancient practice of the court prior to the adoption of Lord Clarendon’s order authorizing the subpoena to be issued before the filing of the bill. Cases are very frequent during the reign of Elizabeth, where costs are adjudged to the defendant for want of a bill after the service of a subpoena. Cary, 98, 108, 105, 114, 118, 143, 145, 153, 156. . . . It is considered most advantageous for the defendant, when he has been improperly served with a subpoena before filing the bill, to wait till the attachment has been issued against him, and then move to set the process aside for irregularity. The effect of such a proceeding is to oblige the plaintiff to sue out and serve a fresh subpoena. 1 Daniell’s Ch. Pr. 593. This, in its operation, is in accordance with the practice in this court, although no resort is had with us to the writ of attachment.”

States.<sup>1</sup> Under the peculiar circumstances of that case it was thought proper that argument should be heard against the motion for leave. We perceive no reason for making such an exception in the case of the present motion. It will be heard, therefore, on the regular motion day, and only on the part of the complainant; and the court will require that ten printed copies of the bill be filed with the clerk before the hearing.”<sup>2</sup>

**§ 168. The same subject continued.**—In case of gross or improper delay between the filing of the bill and the taking out or service of the subpoena, a court of equity, in the exercise of the judicial discretion belonging to it, may refuse this assistance to the plaintiff and direct the bill to be taken off the file.<sup>3</sup> A mistake in antedating a subpoena, when in fact it was not issued before the filing of the bill, may be corrected.<sup>4</sup>

**§ 169. Return day of a subpoena.**—A subpoena to answer a bill to foreclose a mortgage was inadvertently made returnable on Sunday. It was duly served more than ten days before the return day, and no answer filed or appearance entered. It was held that the return day could be amended so as to make it

<sup>1</sup> *State of Mississippi v. Johnson*, 4 Wall. 475.

<sup>2</sup> *State of Georgia v. Grant*, 6 Wall. 241, 242.

<sup>3</sup> *Bancroft v. Sawin*, 143 Mass. 144; *Coppin v. Gray*, 1 Y. & C. (Ch.) 205, 209; *Boyd v. Higginson*, Flan. & Kel. 608, 613; *Forster v. Thompson*, 4 Dru. & War. 803, 818. If process be not taken out within a reasonable time, the filing of the bill may not stop the running of the statute of limitations. *Coppin v. Gray*, *supra*.

<sup>4</sup> *Dinsmore v. Westcott* (1874), 25 N. J. Eq. 802. Objection that no ticket was issued with the subpoena cannot be taken by demurrer. *Ludington v. Elizabeth*, 82 N. J. Eq. 159. Where an amendment to a bill introduces no new fact, and does not in

any respect affect the merits of the case, it is not necessary to issue and serve a new subpoena to answer the amended bill. *Longworth v. Taylor*, 1 McLean, 514; *Angerstein v. Clarke*, 1 Ves. Jr. 250. See § 154, *supra*. By appearing generally one waives his right to object that he is not named as a defendant in the prayer for a subpoena. *Buerk v. Imhaeuser*, 8 Fed. Rep. 457. But Lord Eldon said in *Cook v. Davies*, 1 Turn. & R. 309, 310:—“I have always understood that if a bill is filed and an answer is put in, and then an order is obtained to amend, and the bill is amended, but no subpoena to answer the amended bill is served, the amendments go for nothing.” See, also, *Bramston v. Carter*, 2 Sim. 458.

returnable on the following Monday, and a decree *pro confesso* be entered thereon.<sup>1</sup> The fact that a subpoena to appear and answer is returnable on a legal holiday is not ground for setting it aside.<sup>2</sup> In a copy of the subpoena which was served the return day was stated to be on the 12th of January instead of the 12th of February as in the original. The original subpoena, which was without defect, was exhibited to the defendant with the seal of the court impressed thereon. It was held that the court had jurisdiction.<sup>3</sup>

§ 170. Who may serve a subpoena.—United States Equity Rule 15 provides that “the service of all process, mesne and final, shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case the person serving the process shall make affidavit thereof.”<sup>4</sup> In New Jersey a subpoena in chancery need not necessarily be served by a sheriff or a coroner. It may be served by a private person; but in such case there must be an affidavit of the manner and time of service, and upon the return of the writ a rule must be taken upon the defendant to plead, answer or demur at or before the next stated term of the court.<sup>5</sup> In Vermont the person specially authorized should be named in the order made by the chancellor signing the subpoena. The defendant is not bound to notice any service unless made by a regular officer or person duly authorized by name or by a publication made agreeably to the rules of the court.<sup>6</sup>

<sup>1</sup> *McEvoy v. Trustees*, 88 N. J. Eq. 420.

<sup>2</sup> *Kinney v. Stewart*, 87 N. J. Eq. 339.

<sup>3</sup> “Where the service appears from the return to have been legal and proper though false, it is sufficient to give the court jurisdiction.” *Low v. Mills*, 61 Mich. 35.

<sup>4</sup> The return of the marshal or deputy need not be verified. *Von Roy v. Blackman*, 8 Woods, 98. “When the marshal or his deputy is a party in any cause, the writs and

precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.” U. S. R. S., § 922.

<sup>5</sup> *West v. Smith*, 2 N. J. Eq. 309.

<sup>6</sup> *Allyn v. Davis*, 10 Vt. 547; *Burlington Bank v. Catlin*, 11 Vt. 106. In New Hampshire, where a private person may make service of process by copy, he may himself certify and swear to the copy. *Stone v. Anderson*, 5 Foster (N. H.), 221.

**§ 171. Acceptance of service.**— The provision in the United States statutes<sup>1</sup> that no suit shall be brought in a circuit or district of the United States against an inhabitant of the United States by original process in any other district than that of which he is an inhabitant or in which he may be found at the time of serving the writ applies to suits in equity under the statute<sup>2</sup> to procure the issue of letters patent for an invention after a rejection of the application therefor. The official residence of the commissioner of patents is at Washington in the District of Columbia. A written acceptance by the commissioner of patents at Washington of service of a subpoena issued by the circuit court of the United States for the district of Vermont on a bill in equity filed in that court “to have the same effect as if duly served on me by a proper officer” has no other effect than the regular service by a proper officer would have had, and waives no objection to the jurisdiction, and gives no consent to be sued away from his residence or from the seat of government.<sup>3</sup> A waiver to be binding ought to be clearly manifested, and the court ought not to hold the defendant upon a strained construction of the action and conduct of the parties.<sup>4</sup>

**§ 172. Personal service of a subpoena.**— A United States equity rule provides that “the service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant with some adult person who is a member or resident of the family.”<sup>1</sup> The copy of the subpoena need not be left with

<sup>1</sup> U. S. R. S., § 739.

<sup>2</sup> U. S. R. S., § 4915.

<sup>3</sup> *Butterworth v. Hill*, 114 U. S. 128.

<sup>4</sup> *United States v. Loughrey*, 48 Fed. Rep. 449. A written admission of service by a defendant is not sufficient without proof of the genuineness of his signature. The court takes judicial notice of the signatures of its officers because they are such; but it is not presumed to know the signature of a party defendant who has not appeared in the cause.

*Litchfield v. Burwell*, 5 How. Pr. 342; *Matter of Gibson*, 10 Ark. 572; *Welch v. Walker*, 18 Ala. 120; *Norwood v. Riddle*, 18 Ala. 425. The case first cited also holds that an admission of service made outside of the jurisdiction is no more efficacious than actual service at the same place. See, also, *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. 275, 415.

<sup>1</sup> Equity Rule 18. As to what constitutes a delivery of process to the person, see *Beekman v. Cutter*, 2



the person within the dwelling-house, but is satisfied by a service at the door outside the house. Service was made upon a wife by leaving a copy with her husband in his store under the living rooms of the family.<sup>1</sup> Service at a distance of one hundred and twenty-five feet and in a corner of the yard was not a compliance with such a requirement.<sup>2</sup> The rule does not permit a service to be made by leaving the subpoena at the "last" place of abode, "but it is to be left at the existing, present dwelling-house, or the existing, present, usual customary place of abode."<sup>3</sup>

§ 173. *The same subject continued.*— It was held in New York that if a defendant is absent from home, and no person can be found at his place of abode, a subpoena may be served at his store or place of business by delivering the same to a clerk or servant.<sup>4</sup> Where the defendant has no family, but boards or makes his home in the family of another, the subpoena to appear and answer may, in his absence from home, be served upon either of the heads of the family at such place of his abode, although he has no wife or servant. But to

Code Rep. (N. Y.) 51; *Davison v. Baker*, 24 How. 89; *Bell v. Vincent*, 7 D. & R. (N. Y.) 288; *Niles v. Vanderzee*, 14 How. Pr. 547.

<sup>1</sup> *Phoenix Ins. Co. v. Wulf*, 1 Fed. Rep. 775.

<sup>2</sup> *Kibbe v. Benson*, 17 Wall. 625.

<sup>3</sup> *Hyslop v. Hoppock*, 5 Blatch. 447. It is said in Chief Baron Gilbert's "Forum Romanum," 42, that service of process is good though made on Sunday. But see *Mackreth v. Nicholson*, 19 Ves. 867. "It is of the essence of the power and jurisdiction of all courts that their process is of no validity beyond the territory in which the court sits and to which its jurisdiction extends." Miller, Justice, in *Pacific Railroad v. Missouri Pac. Ry. Co.*, 1 McCrary, 647, 649, holding that a suit to set aside a decree of foreclosure and sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the

service of subpoenas upon persons without the territorial jurisdiction of the court. See, also, *Bourke v. Amison*, 82 Fed. Rep. 710; *Picquet v. Swan*, 5 Mason, 85; *Dunn v. Dunn*, 4 Paige, 425, where the authorities are reviewed. After a cause has been removed to a federal court on the application of the defendant he cannot object to the service of the summons, since petitioning for removal amounts to an appearance. *Tallman v. B. & O. R. Co.*, 45 Fed. Rep. 156, following *Sayles v. Insurance Co.*, 2 Curt. 212. Service of process by leaving a copy at the defendant's place of abode in another State will not sustain a personal decree against him. *Walling v. Beers* (1876), 120 Mass. 548; *Spurr v. Scoville*, 8 Cush. 578; *Moody v. Gay*, 15 Gray, 457; *Dunn v. Dunn*, 4 Paige, 425.

<sup>4</sup> *Smith v. Parke*, 2 Paige, 298.

make such service regular, the place of service must be his actual place of residence at the time of the service, and his absence therefrom must be merely temporary.<sup>1</sup> Personal service of a subpoena is not necessary to create a *lis pendens* which is constructive notice to third persons of the commencement of a suit; and where the subpoena cannot be personally served, the service upon the defendant's wife or other member of his family of suitable age and discretion at the defendant's place of residence will be sufficient.<sup>2</sup>

§ 174. Service upon corporations.—The subpoena in case of a corporation is usually served on the president, cashier, secretary or other principal officer.<sup>3</sup> Service on private corporators is not sufficient.<sup>4</sup> Where a company, though never formally dissolved, had ceased to exist, and the chairman was dead, service was ordered on the late deputy chairman and on the secretary.<sup>5</sup> “The State may impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such a condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business

<sup>1</sup> People v. Craft, 7 Paige, 825.

<sup>2</sup> Hayden v. Bucklin, 9 Paige, 512.

<sup>3</sup> 1 Barb. Ch. Pr. 52; 1 Daniell's Ch. Pr. (5th ed.) 445, n. In an action against municipal corporations service upon the mayor is good. Mayor &c. v. Conover, 5 Abb. 244. See, also, People v. Sturtevant, 9 N. Y. 268. As to who is a “managing agent” within the provision of the New York code, see Brewster v. Michigan Cent. R. Co., 5 How. Pr. 188; Flynn v. Hudson River R. Co., 6 How. Pr. 808; Doty v. Michigan Cent. R. Co., 8 Abb. 427; Bain v. Globe Ins. Co., 9 How. Pr. 448.

<sup>4</sup> When process at common law or in

equity shall issue against a State, the same shall be served on the governor or chief executive magistrate, and attorney-general of such State.” United States Supreme Court Rule 5; Chisholm v. State of Georgia, 8 Peters, 51; s. c., 2 Dall. 419; Grayson v. Virginia, 3 Dall. 320. Service upon the United States should be made upon the attorney-general or district attorney of the district where the suit is brought. 1 Hoffman's Ch. Pr. 108.

<sup>5</sup> De Wolf v. Mallett, 8 Dana (Ky.), 214. See St. Clair v. Cox, 106 U. S. 850, 859.

<sup>6</sup> Gaskell v. Chambers, 26 Beav. 252.

there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation.”<sup>1</sup> “When service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application for the writ or accompanying its service, or in the pleadings or the finding of the court — that the corporation was engaged in business in the State. The transaction of business by the corporation in the State [where suit is brought], general or special, appearing, a certificate of service by the proper officers on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company; that his duties were limited to those of a subordinate employee or to a particular transaction, or that his agency had ceased when the matter in suit arose.”<sup>2</sup>

<sup>1</sup> Mr. Justice Field in *St. Clair v. Cox*, 106 U. S. 350, 356. Such stipulations or conditions apply to suits brought in the federal courts within the State. *Ex parte Schollenberger*, 96 U. S. 369. “Where a foreign corporation is doing business in a State, and the president or any officer is not there transacting business for the corporation, it cannot be said that the corporation is within the State so that service can be made upon it.” *Fitzgerald Const. Co. v. Fitzgerald*, 137 U. S. 98, 106. Citing

*St. Clair v. Cox*, *supra*; *New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 188; *Ex parte Schollenberger*, 96 U. S. 369.

<sup>2</sup> *St. Clair v. Cox*, 106 U. S. 350, 359. Service upon an officer or agent of a foreign corporation is only upheld as effectual to bring the corporation into court in those cases where the corporation maintains an office or transacts business within the State. *McNichol v. Reporting Agency*, 74 Mo. 457; *Reifsnider v. American Imp. Pub. Co.*, 45 Fed.

**§ 175. Service upon persons under disability — Lunatics, married women, convicts.**— Ordinarily an actual service of process on a lunatic defendant is necessary where there is no guardian or committee to bring him before the court.<sup>1</sup> Such service is mere form and may be dispensed with when shown to be dangerous to the lunatic. After an inquisition and appointment of a committee the joinder of a lunatic in a suit is merely a formality and is dispensed with by some courts.<sup>2</sup> Service of a subpoena on the husband alone is good against both husband and wife, and he must answer for both; but if the plaintiff seeks relief out of the separate estate of the wife, the service must be also on her, and she may put in her separate answer.<sup>3</sup> By the amendment of 1874 to United States Equity Rule 13, where husband and wife are sued together,

Rep. 488. See further, as to what constitutes transacting of business within the State, *Cooper Manuf. Co. v. Ferguson*, 118 U. S. 727, 735; *Maxwell v. Atchison & Co. R. Co.*, 87 Fed. Rep. 286; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 685; *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 98; *Riddle v. New York & Co. R. Co.*, 89 Fed. Rep. 290; *Denton v. International Co.*, 86 Fed. Rep. 1; *Zambrino v. Galveston & Co. Ry. Co.*, 88 Fed. Rep. 449. The presence of the chief officers of a corporation in a State other than that of its creation, carrying property of the corporation with them for the purpose of exhibition and advertisement, does not bring the corporation into the State in such a way that service upon them is valid service upon the corporation. *Carpenter v. Westinghouse Air-brake Co.*, 82 Fed. Rep. 484. See, also, *Clews v. Woodstock Iron Co.*, 44 Fed. Rep. 81; *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 58 Fed. Rep. 850. "In the absence of a voluntary appearance three conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam*

over a corporation created without the territorial limits of the State in which the court is held, viz:—(1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation or foreign corporation generally amenable to suit there as a condition, express or implied, of doing business in the State." *United States v. American Bell Tel. Co.*, 29 Fed. Rep. 17, 85.

<sup>1</sup>*Brooks v. Jobling*, 2 Hare, 155; *Harrison v. Rowan*, 4 Wash. C. C. 207; *Morgan v. Jones*, 4 W. R. 381, where service upon the medical officer or keeper of an asylum in which the lunatic was confined was refused. *Heller v. Heller*, 6 How. Pr. 194.

<sup>2</sup>*Shaw v. Burney*, 1 Ired. Eq. 150; *Ortley v. Messere*, 7 Johns. Ch. 187; *Speak v. Metcalf*, 2 Tenn. Ch. 214.

<sup>3</sup>*Ferguson v. Smith* (1816), 2 Johns. Ch. 189; *Leavitt v. Cruger*, 1 Paige, 421; *Eckerson v. Volmer*, 11 How.

personal service on each is required, whereas before that a delivery of a copy to the husband was good.<sup>1</sup> The personal service of a subpoena upon a defendant who is confined in the State prison for a term of years is regular; and the court will not set aside or open a decree by default obtained upon such service, unless it appears that the defendant by reason of his situation was deprived of a legal and meritorious defense.<sup>2</sup> And it has also been held that a service upon the keeper of the prison in such a case was valid.<sup>3</sup>

§ 176. The same subject continued — Infants. — Service of process is ordinarily effected upon an infant in the same manner as upon an adult.<sup>4</sup> The rule has in very particular cases been departed from. Thus where the mother secreted the infants so that they could not be served, a service upon her was declared to be good service.<sup>5</sup> And in a later English case the rule appears to have been still further relaxed, for on a motion that service on the father-in-law should be deemed sufficient, the chancellor said that the register had furnished him with several orders that service upon the mother should be good.<sup>6</sup> These exceptions, however, proceed upon the very principle on which the ruling requiring service on infants is founded. "Service on them would be very absurd if it were not intended by that means to apprise their relations of the institution of a suit, and thus to put it in the power of those most deeply interested in their welfare to protect their interests."<sup>7</sup> It was held in Illinois that a statute authorizing a de-

Pr. 42; *Ferguson v. Smith*, 2 Johns. Ch. 189; *Foote v. Lathrop*, 58 Barb. 188.

<sup>1</sup> *O'Hara v. McConnell*, 93 U. S. 150.

<sup>2</sup> *Phelps v. Phelps*, 7 Paige, 150.

<sup>3</sup> *Johnson v. Johnson*, Walk. Ch. 309.

<sup>4</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 444; *Campbell v. Campbell*, 63 Ill. 462. It has been decided in Tennessee that service of process on the general guardian of an infant will bring the infant itself into court, and authorize a decree against it. *Britain v. Cowen*, 5 Humph. 815; *Cowan v. Anderson*, 7 Cold. 284; *Masson v. Swan*, 6 Heisk.

450; *Scott v. Porter*, 2 Lea, 224.

"These decisions, however, go to the utmost verge of the law, and it is the universal practice of solicitors to have the subpoena served upon all minors, however young, and whether they have general guardians or not." *Gibson's Suits in Chancery*, § 228, note 9.

<sup>5</sup> *Smith v. Marshall*, 2 Atk. 70.

<sup>6</sup> *Thompson v. Jones*, 8 Vea. 141. See, also, *Kirwan v. Kirwan*, 1 Hogan, 264; *Bank of Ontario v. Strong*, 2 Paige, 301; *Sanders v. Godley*, 28 Ala. 478.

<sup>7</sup> *Mussie v. Donaldson*, 8 Ohio, 377,

cree against an infant upon the appointment of a guardian *ad litem* without service of process upon the infant was unconstitutional.<sup>1</sup>

§ 177. Substituted service of a subpoena.— Where an equitable proceeding is a mere dependency on a suit at law, service upon the counsel in the latter may be substituted for service upon the party when such substitution is necessary to enable the court to proceed in the matter;<sup>2</sup> as, for instance, where an action at law on an insurance policy is continued to enable the plaintiff to procure a reformation of the policy in equity for the purpose of maintaining his action.<sup>3</sup> “If a judgment at law be obtained by one person against another and an injunction be applied for, the court will consider a service of the subpoena upon the attorney of the plaintiff at law to be sufficient” if his client live out of the jurisdiction.<sup>4</sup> Where the defendant in a judgment rendered at law in a United States court brings a bill in the same court to enjoin the judgment, it is not considered an original but an auxiliary and dependent suit, and it is the settled practice to order substituted service on the attorney when the plaintiff in the judgment does not reside within the jurisdiction of the court.<sup>5</sup> In the United States courts where a cross-bill, which is auxiliary to the original bill, is filed, substituted service may be had upon the attorney of record, and it is no objection that the party is out of the jurisdiction of the court.<sup>6</sup> Before substi-

379, 381. It was said in that case that it had not been the general practice in Ohio to make service on the infants, and that a very loose mode of doing business had universally prevailed.

<sup>1</sup> *Campbell v. Campbell*, 63 Ill. 462. “Probably no person would contend,” said the court, “that a court could acquire jurisdiction over an adult defendant without notice by ordering an attorney of the court to enter his appearance, and we can see no difference in principle between such a case and one where the court seeks to acquire jurisdiction by appointing a guardian *ad litem* for an

infant and requiring him to file an answer.”

<sup>2</sup> *Abraham v. North German Fire Ins. Co.*, 37 Fed. Rep. 781.

<sup>3</sup> *Abraham v. North German Fire Ins. Co.*, 37 Fed. Rep. 781.

<sup>4</sup> *Hitner v. Suckley*, 2 Wash. C. C. 465; *Dunn v. Clarke*, 8 Pet. 1; *Ward v. Seabry*, 4 Wash. C. C. 426; *Bartlett v. Sultan of Turkey*, 19 Fed. Rep. 346.

<sup>5</sup> *Webb v. Barnwall*, 116 U. S. 193, 197; *Dunn v. Clarke*, 8 Pet. 1.

<sup>6</sup> *Gregory v. Pike*, 29 Fed. Rep. 588. It is the established practice of the United States circuit court in the eighth circuit in suits against a railroad receiver appointed by the State



tuted service upon the solicitors and attorneys of persons before the court in a former suit can be of any validity, an application to the court must be made setting forth the circumstances which render such a service on the attorney or solicitor proper, and an order obtained from the court directing that service be made, and that such service when made shall answer as a substitute for actual service on the party so represented by attorney.<sup>1</sup>

§ 178. **The same subject continued.**— When a bill is not auxiliary to the original suit or in continuation of it, the case is not proper for substituted service.<sup>2</sup> Where a petition, filed subsequent to a decree, institutes a new litigation on new and distinct issues, and is such a radical departure from the original bill that it could not have been introduced by amendment, substituted service on the adverse party is not sufficient to support a personal decree against him.<sup>3</sup> Upon an injunction to stay waste substituted service cannot be made upon the attorney of the defendant in a suit against him by the plaintiff for slandering his title to the land mentioned in the bill.<sup>4</sup> And “the application of the rule for substituted service is denied to cross-bills setting up facts not alleged in the original bill, and which new facts, though they relate to the subject-matter of the original bill, are made the basis for affirmative relief.”<sup>5</sup> If the service relates to a new and independent action in which the attorney has not been specially retained it is not good. If the paper called a cross-bill is in fact not a cross-bill, but is really an independent bill, the substituted service upon the attorney is invalid.”<sup>6</sup>

where the court is held, the defendant being out of the State, to serve summons on one of his station agents within the State. *Central Trust Co. v. St. Louis &c. Ry. Co.*, 40 Fed. Rep. 426.

<sup>1</sup> *Pacific Railroad v. Missouri Pac. Ry. Co.*, 1 McCrary, 647, 650. See, also, *French v. Roe*, 18 Ves. 593.

<sup>2</sup> *Providence Rubber Co. v. Goodyear's Ex'r*, 9 Wall. 807; *Herndon v. Ridgway*, 17 How. 424.

<sup>3</sup> *Smith v. Woolcock*, 115 U. S. 143.

<sup>4</sup> *Hitner v. Suckley*, 2 Wash. C. C. 465.

<sup>5</sup> *Lowenstein v. Glidewell*, 5 Dill. 825; *Rubber Co. v. Goodyear*, 9 Wall. 807.

<sup>6</sup> *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 58 Fed. Rep. 850; *Bowen v. Christian*, 16 Fed. Rep. 780; *Rubber Co. v. Goodyear*, 9 Wall. 807; *Railroad Co. v. Bradleys*, 10 Wall. 292.

In the case first cited the court said:—  
“The purpose of the bill in this case is to foreclose a mortgage executed



**§ 179. Substituted service in proceedings in rem.**— The statutes of the United States provide “that when in any suit, commenced in any court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur, within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the conditions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit, and under the jurisdiction of the court therein within such dis-

by the defendant to the complainant as trustee for the holder of defendant's bonds. The petition in the nature of a cross-bill filed by bondholders is chiefly for the purpose of recovering damages of the complainant for alleged negligent or improper execution of the trust, and by which it is claimed petitioners sustained large damages. . . . My opinion is that it is really an original inde-

pendent bill, and that the substituted service upon it is invalid and should be set aside, and that the order authorizing such service was improvidently granted and should be set aside. An order giving leave to serve a cross-bill by substitution may be set aside.” *Bowen v. Christian*, 16 Fed. Rep. 780; *Rogers v. Riessner*, 81 Fed. Rep. 591.

trict; and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State; provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in said suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein on payment by him or them of such costs as the courts shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.”<sup>1</sup> The statute “clearly recognizes and confers jurisdiction to proceed in the class of cases therein named, which includes the foreclosure of mortgages, even though one or more of the defendants was not an inhabitant of the district wherein the suit was brought.”<sup>2</sup> A suit to establish a trust in real estate is within the statute “to the extent, at least, of settling the rights of the parties in respect to the real property in question,” though the bill also prays for an accounting and for other relief.<sup>3</sup> It applies to a suit to foreclose a railway mortgage which has already been foreclosed under a junior mortgage and sold subject to the prior mortgage, the property being still in the custody of the court through its receiver.<sup>4</sup> But the statute does not cover a suit to determine the title to such incorporeal and intangible property as a patent right, “possession of which must of necessity be ideal, not actual, and which cannot be seized or sold under an execution.”<sup>5</sup>

<sup>1</sup> U. S. R. S., § 738, as amended by act of March 3, 1875, ch. 137, § 8 (18 St. at L. 472).

<sup>2</sup> “This section is clearly intended to define the place of bringing suit when the purpose is the enforcement of a lien upon title to realty, and under its provisions it is the location of the property, and not the residence of the parties, that settles the place of suit.” *Ames v. Holderbaum*, 42 Fed. Rep. 341.

<sup>3</sup> *Porter Land & Water Co. v. Bas-kin*, 43 Fed. Rep. 328, 329.

<sup>4</sup> *Farmers' Loan & Trust Co. v. Houston & Ry. Co.*, 44 Fed. Rep. 115.

<sup>5</sup> “Statutes which undertake to give to courts jurisdiction over non-residents who do not come within the district for purposes either of residence or business should not be enlarged by too liberal construction.” *Non-magnetic Watch Co. v. Association Horlogere Suisse of Geneva*, 44 Fed. Rep. 6, 7.

Where the substantial purpose of the suit is an accounting, though the bill contains a prayer for a receiver as auxiliary thereto, it is not a case for the service provided in the statute.<sup>1</sup> Shares of stock, held and claimed by a non-resident of the district within which the company has its domicile, cannot be said to be "property within the district."<sup>2</sup>

§ 180. **The same subject continued.**—"The act is silent on the subject of the evidence that will authorize the making of an order for substituted service. The marshal's return to a subpoena that one or more of the defendants cannot be found within the district would no doubt authorize the court to enter such an order. But this is not the only evidence that will authorize the court to enter an order for substituted service. An affidavit such as was produced in this case<sup>3</sup> is sufficient evidence that the defendants named in it are not inhabitants of the district. When it is made to appear at the commencement of the suit, or at any subsequent time, that a defendant is not an inhabitant of the district and cannot be found within it, and will not or does not voluntarily appear to the suit, an order may be entered specifying a day for such defendant to appear and plead, answer or demur. It is not necessary to wait and see if the absent defendant will not voluntarily enter his appearance, or that he may be found and personally served with process in the district."<sup>4</sup>

<sup>1</sup> The prayers "involve, it is plain, only the personal rights and obligations of the parties." *Ellis v. Reynolds*, 85 Fed. Rep. 894.

<sup>2</sup> "The possession of capital stock does not give a person a particle of legal interest in the corporation property. *Morgan v. Railroad Co.*, 1 Woods, 18." *Kilgour v. New Orleans Gas Light Company*, 2 Woods, 144, 150.

<sup>3</sup> At the time the bill was filed one of the complainant's solicitors filed his affidavit describing the plaintiff's cause of action and stating that some of the defendants were not inhabitants of the district and could not be found therein.

<sup>4</sup> *Gresham, J.*, in *Forsyth v. Pier-son*, 9 Fed. Rep. 801. Continuing, the court said:—"The act says the absent defendant shall be ordered to appear on a day to be designated in the order—not on a rule-day. And furthermore, the order for the appearance of the absent defendant is not a subpoena or process within the meaning of Rule 17 or Rule 15, which provides that the service of all process, mesne and final, shall be by the marshal of the district or by his deputy, or by some other person specially appointed by the court for that purpose. . . . The order is nowhere referred to as process, and no particular service or proof of serv-

**§ 181. Service by publication.**—“Statutes which confer the power to proceed to an *ex parte* hearing in the absence of personal service . . . should not be construed with any degree of liberality in favor of him who seeks the exceptional mode of service. The party invoking their aid should be required to comply with the statutory conditions and limitations.”<sup>1</sup> Under the act of congress<sup>2</sup> providing that in certain cases the court may order a summons to be served personally upon non-resident defendants, and when personal service is not practicable to be served by publication, it is no excuse for failure to make personal service that the expense attending the service is “great” or that the number of defendants is “large,” or, in cases against several defendants, all of whom are alleged generally to be non-residents, that the residences of “many” could not be ascertained by the exercise of reasonable diligence. “In the last-named category the application should distinctly state the known places of residence and show the diligence used to ascertain the places of residence when unknown. Then the court would have before it the data to direct personal service in the one case and publication of the order in the other.”<sup>3</sup>

ice is required.” In *Bronson v. Keokuk*, 2 Dill. 498, it was held that the order must be made by the court in term. Judge Dillon said:—“Perhaps the court might make a special order directing or authorizing service by some other officer [than the marshal]. . . . It would appear to be a proper practice for the bill to aver the citizenship and residence of the respective defendants; to let the subpoena issue against all, and if the marshal return some of them not found, and they do not voluntarily appear, on a showing of these and the necessary facts . . . by affidavit, the court will make the order to appear and plead, and direct the mode of serving the same.”

<sup>1</sup> *Batt v. Proctor*, 45 Fed. Rep. 515, 517. To support a decree for fore-

closure against an absent defendant brought in by publication, publication for the full period required is necessary. *Guaranty Trust Co. v. Green Cove R. Co.*, 189 U. S. 187.

<sup>2</sup> U. S. R. S., § 738, as amended by act of March 3, 1875 (18 St. at L. 472).

<sup>3</sup> Maxey, J., in *Batt v. Proctor*, 45 Fed. Rep. 515, 517. “The practice under the act should be such as to secure personal service in all cases when the residence of the absent defendant is known or can be ascertained, and to substitute or resort to constructive service by publication only where the better mode is not practicable within a reasonable time and by the exercise of reasonable diligence.” Dillon, J., in *Bronson v. Keokuk*, 2 Dill. 498.

**§ 182. Preliminary affidavit — Mailing — Amendment of defects — Effect of irregularities.**— Where a statute made it the duty of the court making an order of publication against an absent or non-resident defendant to require the person applying for the order to state in his affidavit the residence of such absent or non-resident party, and that the court should direct the clerk to transmit by mail a copy of the order to the party, an order requiring the publication without directing the mailing of a copy was held insufficient to sustain a decree *pro confesso*.<sup>1</sup> A defect in the affidavit of mailing a copy of the notice to an absent defendant, in not showing that the place to which it was directed was the defendant's postoffice address, may be remedied by supplying the proof by way of amendment.<sup>2</sup> An error in the name of a paper in which notice to an absent defendant was directed to be published, and was published, is amendable after sale under execution. No prejudice thereby results to the purchaser's title.<sup>3</sup> An actually defective publication, as where the publication was not for the required length of time, goes to the jurisdiction of the court and renders the subsequent proceedings void.<sup>4</sup> Where notice of publication against infant non-

<sup>1</sup> *Ingersoll v. Ingersoll*, 42 Miss. 155.

<sup>2</sup> *Dinsmore v. Westcott*, 25 N. J. Eq. 802. The publication of an order for the appearance of a non-resident defendant is rendered unnecessary by his appearance by solicitor after an order is granted. *Long v. Long*, 59 Mich. 296. In New Jersey, where any of the defendants reside in the State and are served with process, it is not necessary, unless under special circumstances, that the order for the appearance of absent defendants should be published in any newspaper out of the State. Foreign publication is only required where all of the defendants reside out of the State. *Wetmore v. Dyer*, 2 N. J. Eq. 386. The provision in a Florida statute authorizing notice to be given to an absent defendant to appear by publishing in a newspaper once a week

for four months means calendar months, and not lunar months. *Guaranty Trust Co. v. Green Cove R. Co.*, 139 U. S. 187.

<sup>3</sup> *Equitable Life Ass. Soc. v. Laird* (1879), 24 N. J. Eq. 319. The proceeding by publication on the ground that the defendant does not reside in the State does not apply to those such as mariners who are temporarily absent in their vocation. *McKim v. Odom*, 3 Bland (Md.), 407.

<sup>4</sup> *Guaranty Trust Co. v. Green Cove R. Co.*, 139 U. S. 187. Where a bill is filed to set aside a decree as void, on the ground that there was no sufficient publication against the defendant, if publication is recited therein as having been made, it will be presumed to have been made according to law. *Robertson v. Winchester*, 1 Pickle (Tenn.), 171; s. c., 1 S. W.

residents is nugatory and void the appointment of a guardian *ad litem* for them based upon such publication is also void if they are not in court amenable to any of its orders.<sup>1</sup>

§ 183. **Conclusiveness of preliminary affidavit.**— Where a statute provided that upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating his belief that the plaintiff is not a resident of the State or cannot be found therein, and that he has deposited a copy of the summons in the postoffice directed to the defendant at his place of residence, etc., service may be by publication, it was contended that if the place to which the summons was addressed was not in fact the residence of the defendant it would avoid the entire proceedings, although the affidavit in form was all that the statute required. But Brewer, J., said:—“The statute does not require that the affidavit be true. The case must be one in which service by publication can be had, and the affidavit is but one step in the procedure. A defect in that step may be ground for reversal, but is it fatal to the jurisdiction? In some States a *præcipe* is required before summons can issue. Suppose without *præcipe* a summons is issued and served, would not the court have jurisdiction notwithstanding the error in the procedure? So here the publication is the service, while the affidavit is only one step preliminary to the publication — the service. I do not mean to hold that a publication without affidavit, or one without affidavit in the form required by the statute, would be sufficient to bring the defendant into court. . . . All that I

Rep. 781. But where an order of publication has not been returned, an entry on the record “that it was proved to have been duly executed” is insufficient evidence of publication to authorize the rendition of a decree. *Green v. McKinney*, 6 J. J. Marsh. 193, 197. But see *Swift v. Stebbins*, 8 Ala. 447.

<sup>1</sup> *McDermaid v. Russell*, 41 Ill. 489, 491; *Campbell v. Campbell*, 63 Ill. 462; *Chambers v. Jones*, 72 Ill. 275. A decree against a non-resident defendant was held not invalid as

against a collateral attack because, while his name was Ellett, the proceedings described him as Elliott. *Robertson v. Winchester*, 85 Tenn. 171. Where the notice required to be given to an absent defendant was entitled in the cause, and not directed to the defendant, nor mailed within twenty days after the date of the order, such defendant was held not to be within the jurisdiction of the court, and that no decree could be made against him. *Karr v. Karr*, 19 N. J. Eq. 427.



hold is that where the publication is beyond question and the affidavit is in the form required, a mistake like the one in question does not defeat the jurisdiction.”<sup>1</sup>

**§ 184. Proof of publication.**—A statute requiring proof of publication in a newspaper to be made by the “affidavit of the printer or his foreman, or his principal clerk,” is satisfied when the affidavit is made by the editor of the paper.<sup>2</sup> Under a like statute the affidavit of the publisher was held sufficient.<sup>3</sup> It may not be amiss to caution the practitioner against committing the error which rendered unavailing the affidavit in a California case, which read as follows:—“H. F. W., principal

<sup>1</sup> *Martin v. Pond*, 80 Fed. Rep. 15, holding further that a finding of due service by the court could not be challenged collaterally. In *Cooper v. Reynolds*, 10 Wall. 808, 819, which was an attachment case where the affidavit was defective, the Supreme Court sustained the judgment and Mr. Justice Miller said:—“The affidavit is preliminary to the issuing of the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied the affidavit has served its purpose, and though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that deprived the court of the jurisdiction acquired by the writ levied upon the defendant’s property.” When the subpoena was returned with an affidavit of the sheriff that he had made due and diligent inquiry for the defendant, and was informed and believed that he was not a resident of the county at that time, but of another State, it was held in New Jersey that the statutory order for publication was warranted, though

the defendant was a resident of New Jersey. *Equitable Life Ass. Soc. v. Laird*, 24 N. J. Eq. 819. But see *Fiske v. Anderson*, 88 Barb. 71; *Peck v. Cook*, 41 Barb. 549. And for the requisites of an affidavit under the New York Code:—*Hyatt v. Wagener*, 18 How. Pr. 248; *Cook v. Farnen*, 84 Barb. 95; *Brameld v. Heydrick*, 82 How. 97; s. c., 49 Barb. 62; *Waffle v. Goble*, 53 Barb. 517; *Van Wyck v. Hardy*, 20 How. Pr. 222; *Warren v. Tiffany*, 17 How. Pr. 106; *Evertson v. Thomas*, 5 How. Pr. 46; *Godkin v. Redgate*, 1 Crompt. & Jer. 401.

<sup>2</sup> *Pennoyer v. Neff*, 95 U. S. 714, 721. But see the following section.

<sup>3</sup> Printer and publisher may be considered as synonymous for this purpose, the latter being within the spirit of the statute. *Bunce v. Reed*, 16 Barb. 847, 850 (explained in *Howard v. Hatch*, 29 Barb. 297, 301); *Sharp v. Dangney*, 33 Cal. 505. It seems that when the affidavit of publication is defective an amended affidavit may be filed according to the truth of the case. *Bunce v. Reed*, *supra*. It is not sufficient that an order of publication is had in a chancery cause. Proof of the publication must also be made. *Moore v. Wright*, 8 Ala. 84.



clerk in the office of the California Chronicle, . . . deposes and says," etc. The statute required that an order of publication should be proved by the affidavit of the printer, or his foreman or principal clerk, and the court said: — "That the affiant is one of the three is itself a substantive fact and must be proved as such before the court in which the action is pending can proceed to render judgment against the parties to whom notice is intended to be given. In the affidavit now in question the affiant swears to nothing except to the matters set forth after the word 'deposes.' He names himself as principal clerk, but he does not swear that that was his position in fact."<sup>1</sup> But after judgment it will be presumed that there was proof *aliunde* of the relation of deponent to the paper.<sup>2</sup>

§ 185. The same subject continued.— Where a statute gave validity to the certificate of "the printer in whose paper the order shall have been published," it was held to mean a printer having an interest as owner of the paper in which the order was published, and that the certificate of an editor was not a compliance with the statute.<sup>3</sup> The certificate should always show upon its face that it was given by an authorized person. If this is not shown the evidence of the fact required by law is not furnished, and therefore in all cases it would be advisable for printers to commence their certificates by styling themselves *pro forma* "printers and proprietors of the newspaper denominated," etc., or by other express description show that they are the persons designated in the statute.<sup>4</sup> A cer-

<sup>1</sup> Citing in point, *Ex parte Bank of Monroe*, 7 Hill, 178; *Cunningham v. Goelet*, 4 Denio, 71; *Staples v. Fairchild*, 8 N. Y. 44; *Payne v. Young*, 8 N. Y. 158.

<sup>2</sup> *Hahn v. Kelly*, 34 Cal. 891, 419. Where the certificate of the publisher stated that notice was first published on August 18th. and the clerk certified that he mailed a copy of the paper to the defendants on "August 17th and within ten days after the first publication," the statement as to the date showing that it

was mailed before publication being senseless was rejected and the certificate deemed sufficient. *Michael v. Michael* (Ill.), 27 N. E. Rep. 694.

<sup>3</sup> *Brown v. Wood*, 6 J. J. Marsh. (Ky.) 11, 19.

<sup>4</sup> *Brown v. Wood*, 6 J. J. Marsh. (Ky.) 11, 19, where the court said: — "Printing is one of the most important trades conducted by men, and those who follow the business for a livelihood and set up printing establishments and are responsible as owners for the publications made are

tificate of publication by the wrong person may be rectified by permitting a certificate to be returned by the proper person.<sup>1</sup> The certificate should show when and in what paper the order was published. For that reason a certificate that "I, the editor and publisher of the Columbian, do certify that the above advertisement has been published for two months successively," was held insufficient.<sup>2</sup>

§ 186. No personal decree on service by publication.— "Substituted service by publication or in any other authorized form may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State or of some interest therein by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State

those who by the act of assembly may give certificates entitled to credence. Being owners, if they employ others to furnish original articles, editors to superintend and journey-men to set the type and work the press, and thus by means of the services of others cause the business to be carried on, they may with propriety be denominated printers, although the mental and manual labor appertaining to the establishment may be

performed by others. Such proprietor is a printer in contemplation of the act of assembly according to the maxim, *qui facit per alium facit per se*." See, also, *Butler v. Cooper*, 6 J. J. Marsh. 29, 30; *Sprague v. Sprague*, 7 J. J. Marsh. 331.

<sup>1</sup>*Jeffery v. Callis*, 4 Dana (Ky.), 466.

<sup>2</sup>*Hopkins v. Claybrook*, 5 J. J. Marsh. 234.

cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability.”<sup>1</sup>

<sup>1</sup> Mr. Justice Field in *Pennoyer v. Neff*, 95 U. S. 714, 727. “It is hardly necessary to observe,” continued Justice Field, “that in all we have said we have had reference to proceedings in courts of first instance and to their jurisdiction and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action.” *Nations v. Johnson*, 24 How. 195. That a personal decree cannot be had upon constructive service, see, also, *Smith v. Woolfcock*, 115 U. S. 148, 149; *Pennoyer v. Neff*, 95 U. S. 714; *Harkness v. Hyde*, 98 U. S. 476; *Brooklyn v. Insurance Co.*, 99 U. S. 362; *Empire v. Darlington*, 101 U. S. 87. “Wherever,” said Mr. Justice Field, “it appears from inspection of the record of a court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or

decree. When, therefore, by legislation of a State, constructive service of process by publication is substituted in the place of personal citation, every principle of justice exacts a strict and literal compliance with the statutory provision.” *Galpin v. Page*, 18 Wall. 350, 368, 369. See, also, *Guaranty Trust Co. v. Green Cove Railroad*, 139 U. S. 137, 148; *Earle v. McVeigh*, 91 U. S. 503; *Settemier v. Sullivan*, 97 U. S. 444; *Cheely v. Clayton*, 110 U. S. 701; *Applegate v. Lexington & Co. Min. Co.*, 117 U. S. 255. On the other hand it was said in an Illinois case that “a construction so strict that it would endanger the validity of titles and the stability of legal proceedings should not be placed upon the statute. The real question is and should be, not whether the notice given was formally and technically accurate, but whether or not the object and intent of the law was substantially attained thereby.” So where a notice of publication stated the venue in a certain county, was entitled of the circuit court of that county, and stated that a bill had been filed in that court and a summons issued out of it, it sufficiently showed the place where the summons was returnable. *Michael v. Michael* (Ill.), 27 N. E. Rep. 694. See, also, *Goudy v. Hall*, 86 Ill. 313; *Clark v. Marfield*, 77 Ill. 258; *Vanpelt v. Hutchinson*, 114 Ill. 435.

§ 187. **Return of service.**—Where there is a personal service upon the defendant, the making of the return in the name of a special deputy marshal instead of in the name of the marshal is only an irregularity which the defendant can take advantage of in the original proceedings and cannot be raised by strangers to the judgment.<sup>1</sup> A statute provided that a copy of the summons should be “left at the usual place of abode of the defendants with some white person of the family of the age of ten years or upwards and informing such person of the contents thereof.” A return stated that it was executed “by leaving copies of this writ at the residence of the within named A. B. in the hands of white persons over fourteen years of age, after having explained to them the contents thereof.” The return was held insufficient. The court said:—“The broad grounds of service given by the statute require a rigid adherence to its literal import. For aught that appears by the return, the persons with whom the copy was left may have had no connection with or knowledge of the family of the defendants or the defendants themselves.”<sup>2</sup> A return in these words, “Served this writ on the within named,” etc., “by delivering a copy to him, the 16th day of March, 1861,” is sufficient, and not open to the objection that the date refers to the return and not to the service.<sup>3</sup> A return to a subpoena against A. B. and C. D. was as follows:—“Executed on A. B.; C. D. not found.” A decree reciting that it appeared to the satisfaction of the court that the subpoena had been duly executed was entered against the defendant *pro confesso*. It was held that the return was insufficient to authorize a decree.<sup>4</sup> A return of service against Jacob Kraig as served on Jacob Krug was held insufficient, the name not being *idem sonans*, and the return of service was set aside.<sup>5</sup>

<sup>1</sup> Hill v. Gordon, 45 Fed. Rep. 270.

<sup>2</sup> Townsend v. Griggs, 8 Ill. 365.

<sup>3</sup> Harmon v. Campbell, 30 Ill. 25.

<sup>4</sup> Pegg v. Capp, 2 Blackf. 257. In Johnson v. Shepard, 35 Mich. 115, where a sheriff by a manifest clerical error certified that he had served a subpoena on a day before it was dated and issued, the defendant after decree applied for leave to file a bill

of review. The court said the defect relied upon was not well founded in fact and such a slip would have given no very strong support to an appeal to the discretion of the court.

<sup>5</sup> McCloskey v. Barr, 45 Fed. Rep. 151. For other cases of fatal variance in names see King v. Shakespeare, 10 East, 83; Whitewell v. Bennett, 3 Bos. & P. 559, where John

§ 188. **The same subject continued — Amendment of return.**— “Courts have the power to permit officers to amend their returns to both mesne and final process, and the power is exercised liberally in the interest of justice when the rights of third parties are not to be affected by the amendment. In the exercise of a sound discretion they have allowed officers to amend their returns according to the real facts after the lapse of years; and when there is no doubt about the facts, such amendments have been allowed after an officer’s term has expired.”<sup>1</sup> Accordingly, where the officer’s return read, “I served [the *feme covert* defendant] by leaving a copy for her with her husband,” the officer was permitted to amend his return so as to say that he had served the subpoena on her by leaving a copy for her with an adult person, etc., in compliance with the terms of the rule.<sup>2</sup> After a cause has been removed to a federal court the sheriff cannot amend his return on the summons.<sup>3</sup>

§ 189. **Motion to quash for irregularity.**— In the federal courts service of a subpoena outside the judicial district is unauthorized and ineffective as compulsory process, but the defendant may nevertheless wish to signify his unwillingness to voluntarily submit to the court. In such a case the proper practice is to obtain an order of the court for leave to enter a special appearance with the clerk upon an undertaking to submit to the further orders of the court if the objection should not be sustained, and after such conditional appearance to move the court to discharge the service for the irregularity complained of.<sup>4</sup> No sufficient service of process having been

Couch was held to be a fatal variance from John Crouch. *Commonwealth v. Gillespie*, 7 Serg. & R. 470; *Mann v. Carley*, 4 Cowen, 148.

<sup>1</sup> *Phoenix Ins. Co. v. Wulf*, 1 Fed. Rep. 775, citing *Adams v. Robinson*, 1 Pick. 461; *Johnson v. Day*, 17 Pick. 106; *People v. Ames*, 35 N. Y. 482; *Jacobson v. O. & M. R. Co.*, 15 Ind. 192; *De Armand v. Adams*, 25 Ind. 455.

<sup>2</sup> *Phoenix Ins. Co. v. Wulf*, 1 Fed. Rep. 775.

<sup>3</sup> *Tallman v. B. & C. R. Co.*, 45 Fed. Rep. 156.

<sup>4</sup> *Romaine v. Union Ins. Co.*, 28 Fed. Rep. 625, where the authorities are examined and the practice explained. “Upon the return of the subpoena as served and executed upon any defendant the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry. Equity Rule 16.

made upon the defendant he appeared specially "for the purpose of excepting to the jurisdiction of the court," and moved that an injunction against him should be vacated. The motion was overruled, and he filed an answer to the bill not waiving the objection to the jurisdiction. The court afterwards ordered the injunction to be dissolved on the defendant filing a stipulation to abide the decree of the court in the case. The defendant filed the stipulation and a decree was entered against him. It was held that his acts did not amount to a waiver of the objection of the want of jurisdiction.<sup>1</sup>

**§ 190. Exemption from service of process.**—Under the provision of the federal constitution that senators and representatives "shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attend-

<sup>1</sup> *Walling v. Beers*, 120 Mass. 548. In *Gould v. Castel*, 47 Mich. 604; s. c., 11 N. W. Rep. 405, a subpoena was issued in due form and returned with regular proof of personal service. The copy served on the defendant was not a true copy, as it contained no return day whatever. The defendant, however, allowed the complainant to go on and take a decree *pro confesso* on July 1, 1880. On December 18th following he moved in person to vacate the proceedings subsequent to the bill and issue of subpoena on the ground that the copy of the subpoena contained no appearance day. He made no showing of merits nor tendered any answer. Neither did he suggest any excuse or explanation for his delay. The court said:—"We think the defendant was guilty of gross laches and was in fault by lying by and not moving on his own contention in regard to the defect of the subpoena." In *Creveling v. Moore*, 39 Mich. 568, which was a foreclosure suit in which there had been a decree *pro confesso* entered May 26, 1877, and a petition filed May 1, 1878, to set the decree

aside on the following grounds:—

(1) The subpoena issued and served was signed by the deputy register in his own name and not in the name of his principal; (2) that by the subpoena the defendants were called to answer a bill of complaint of "Nelson Creveling, of Minnie J. Bondman," whereas the decree was in favor of "Nelson Creveling, guardian of Minnie J. Bondman;" (3) that the copy of the subpoena served was not subscribed by the complainant or his solicitor or by the officer serving the same as required by the rules of court,—the court said:—"The defects were mere irregularities, and if the defendants desired to take advantage of them they should have moved promptly. After the lapse of time appearing in this case such objections are not to be listened to." The court will set aside the service of a subpoena upon an alleged agent when it appears from depositions taken that the person served was not the agent of the defendant. *American Bell Tel. Co. v. Pan Electric Tel. Co.* (Penn.), 28 Fed. Rep. 625.



ance at the session of their respective houses, and in going to and returning from the same," a member of congress is entitled to exemption from service of process, although not accompanied with arrest of the person, while on his way to attend a session of congress.<sup>1</sup> Witnesses or parties residing in a foreign State, while attending the court of another State, cannot be served with process for the commencement of a civil action against them in the latter State. "Upon principle as well as upon authority their immunity is absolute *eundo morando et redeundo*."<sup>2</sup> The exemption does not depend upon statutory provisions, but is deemed necessary for the due administration of justice, and is abundantly sustained by authority.<sup>3</sup> "The general principle that parties,

<sup>1</sup> *Miner v. Markham*, 28 Fed. Rep. 887. It was there held that while the privilege allows him only a reasonable time in going to attend a session, it is not strictly confined to the exact number of days required for the journey, nor will it be forfeited for a slight deviation from the route which is most direct. Where a defendant appears specially in a State court, both in his motion to set aside a service of summons and in his application for the removal of the case to the United States court, and the motion in the State court is denied without prejudice to a renewal of the same, the defendant has not waived his privilege and can assert it in the United States circuit court with the same force and effect as if the suit had been brought and the motion made there in the first instance. *Miner v. Markham*, *supra*. See, also, *Porter Land & Water Co. v. Baskin*, 48 Fed. Rep. 828, 825; *Harkness v. Hyde*, 98 U. S. 479; *Powers v. Braly*, 75 Cal. 288; s. c., 17 Pac. Rep. 197; *Atchison v. Morris*, 11 Fed. Rep. 582.

<sup>2</sup> *Person v. Grier*, 66 N. Y. 125, where it was said that whether any distinction exists between resident

and non-resident witnesses and suitors is at least doubtful. See, also, *Seaver v. Robinson*, 8 Duer, 622; *Merrill v. George*, 28 How. Pr. 831; *Larned v. Griffin*, 12 Fed. Rep. 590, which is an instructive case in its collation of the authorities.

<sup>3</sup> *Cole v. Hawkins*, Andr. 275; s. c., 2 Str. 1094; *Arding v. Flower*, 8 T. R. 584; *Miles v. McCullough*, 1 Binn. 77; *Hayes v. Shields*, 2 Yeates. 222; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Halsey v. Stewart*, 4 N. J. Law, 366; *Miller v. Dungan*, 87 N. J. Law, 182; *In re Healey*, 53 Vt. 694; *Sanford v. Chase*, 8 Cowen, 381; *Harris v. Granthorn*, 1 N. J. Law, 142. The exemption has been frequently accorded to creditors attending proceedings in bankruptcy. *Matthews v. Tufts*, 87 N. Y. 568; *Ex parte List*, 2 Ves. & B. 378; *Ex parte King*, 7 Ves. Jr. 812. And to a creditor who attended before the commissioners to propose himself as assignee and watch the proceedings. *Selby v. Hills*, 8 Bing. 166. In *Van Lieu v. Johnson* (decided in New York in March, 1871, but not reported), referred to in *Person v. Grier*, 66 N. Y. 124, 126, it was held that



witnesses and jurors are privileged from service of legal process in civil action, while in good faith they are in attendance upon the hearing of a cause in court, is well recognized by the authorities, and in the case of parties and witnesses this exemption from service of process extends to the taking of testimony before a master or commissioner preparatory to the final submission of the cause to the court. In point of time, the privilege exists during the time fairly occupied in going to and returning from the place of trial or hearing, as well as during the time when the party is in actual attendance at the place of trial.”<sup>1</sup> “If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him and process is there served, it is such an abuse that the court will on motion set the process aside.”<sup>2</sup> The service of a writ of garnishment from a State court upon a witness in a federal court is not a contempt, and the complainant in such suit will not be restrained from proceeding in the State court.<sup>3</sup>

the privilege was lost by remaining within the State an unreasonable and unnecessary time after the close of the trial upon which he had entered as a party.

<sup>1</sup> *Nichols v. Horton*, 14 Fed. Rep. 827, and cases cited. But it was there decided that when they lay aside the character of parties or witnesses, and for their own behalf and benefit give cause for the institution of actions against them by third parties, they cannot invoke this privi-

lege, but must be deemed to have waived the exemption. The trial upon which the party or witness is in attendance must not, however, be interfered with by such service.

<sup>2</sup> *Fitzgerald Const. Co. v. Fitzgerald*, 187 U. S. 98, 105; *Union Sugar Refinery v. Matthiesson*, 2 Cliff. 809; *Baker v. Wales*, Abb. Pr. (N. S.) 881; *Blair v. Turtle*, 5 Fed. Rep. 894; *Steiger v. Bonn*, 4 Fed. Rep. 17.

<sup>3</sup> *Ex parte Schulenburg*, 25 Fed. Rep. 211.

## CHAPTER VI.

### TAKING THE BILL PRO CONFESSO.

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| <p>§ 191. Nature of the proceeding to take bills <i>pro confesso</i>.</p> <p>192. When a decree <i>pro confesso</i> may be taken.</p> <p>193. Affidavit of regularity.</p> <p>194. Decree <i>pro confesso</i> for defective answer.</p> <p>195. When proof of the bill is necessary.</p> <p>196. Effect of answer by one of several defendants.</p> <p>197. Decrees <i>pro confesso</i> against infants.</p> <p>198. Effect of amending the bill.</p> <p>199. Rights of the defendant after decree <i>pro confesso</i>.</p> <p>200. Decree <i>pro confesso</i> as an estoppel.</p> <p>201. The same subject continued.</p> | <p>§ 202. Opening decrees <i>pro confesso</i> — The general rule.</p> <p>203. Who may apply to open decrees <i>pro confesso</i>.</p> <p>204. Grounds for opening decrees <i>pro confesso</i>.</p> <p>205. The same subject continued.</p> <p>206. Requisites of the application to open a decree <i>pro confesso</i>.</p> <p>207. Terms upon which decrees <i>pro confesso</i> are opened.</p> <p>208. Opening decrees on account of defective process.</p> <p>209. Practice in taking bills <i>pro confesso</i> in the federal courts.</p> <p>210. The same subject continued.</p> |
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§ 191. Nature of the proceeding to take bills *pro confesso*.—The proceeding which is termed taking a bill *pro confesso* is the method adopted by the court for rendering its process effectual, where the defendant fails to appear and answer, by treating the defendant's contumacy as an admission of the complainant's case, and by making an order that the facts of the bill shall be considered as true and decreeing against the defendant according to the equity arising upon the case stated by the complainant.<sup>1</sup> "The practice of treating the

<sup>1</sup> Daniell's Ch. Pr. (5th ed.) 517. See §§ 209, 210, *infra*. "By the ancient course of the court no bill could be taken *pro confesso* unless an appearance had been entered. If the defendant would not appear the court could not decree a bill *pro confesso*, but ordered a sequestration against his

real and personal estate until he cleared his contempt. In order, therefore, to obtain an appearance a long chain of process was employed, ending in a sequestration of the defendant's property. By this process his lands were entered upon and his personal property taken possession of. Indeed the

defendant's neglect or refusal to put in an answer as an admission of the truth of the allegations of the bill seems not to have been of very ancient standing in the English Court of Chancery. The course formerly was to put the complainant to make proof of the substance of his bill. But the practice more recently established was to take the bill *pro confesso*. Before doing so, however, the complainant was required to resort to all the processes of the court in order to compel the defendant to answer. And such seems to have remained the practice in England until the recent orders adopted within the last few years."<sup>1</sup> The matter is now largely regulated in England, and in the State and federal courts, by statutes or rules of court.<sup>2</sup>

§ 192. When a decree *pro confesso* may be taken.—In New Jersey a decree *pro confesso* may be taken at any time after the time limited for the defendant to plead, answer or demur has expired. It may be taken without notice, and is of course, unless it appear that some prejudice will thereby accrue to the adverse party.<sup>3</sup> It is error to take a bill for

rule seems to have been then as it clearly is now, that properly the sequestration in mesne process was not to be executed by a sale of the goods, but only by keeping the property out of possession; being only to found the process of taking the bill *pro confesso* upon the parties' contempt. After the bill was taken *pro confesso* and a decree, the sequestration was executed, and the party upon application of the court obtained satisfaction of his demand." The foregoing quotation is taken from a carefully prepared history of the practice and effect of taking bills *pro confesso* in a report by Hoffman, master, made to Chancellor Sanford in *Williams v. Corwin*, Hopk. Ch. (N. Y.) 470. See, also, *Pendleton v. Evans*, 4 Wash. C. C. 887.

<sup>1</sup> *Lanum v. Steele* (1849), 10 Humph. 279, 281.

<sup>2</sup> See 1 Daniell's Ch. Pr. (5th ed.)

ch. XI. In the federal courts, if the defendant does not enter his appearance on or before the day at which the writ is returnable, the bill may be taken *pro confesso*. Equity Rule 12. See §§ 209, 210, *infra*. Under the former practice in New York, where the bill was for relief only, and stated sufficient ground, it was not necessary to prosecute a party to a contempt and sequestration before taking the bill *pro confesso*. *Caines v. Fisher* (1814), 1 Johns. Ch. 8.

<sup>3</sup> *Oakley v. O'Neill*, 2 N. J. Eq. 287. If a defendant after an appearance will not answer, the bill will be taken *pro confesso*. *Caines v. Fisher* (1814), 1 Johns. Ch. 8. The West Virginia code provides that a "plaintiff in equity may have any plea or demurrer set down to be argued. If the same be overruled no other plea or demurrer shall afterwards be received, but there shall be a rule upon

confessed against a party proceeded against as a non-resident, and render a personal decree against him, if he has not appeared in the cause.<sup>1</sup> Where a bill is taken as confessed, an answer afterwards filed without consent or leave of the court will not be considered.<sup>2</sup> A bill answered in part may be taken

the defendant to answer the bill, and if he fail to appear and answer the bill on the day specified in the order, the plaintiff shall be entitled to a decree against him for the relief prayed for therein." *Hays v. Heatherly* (West Va.), 15 S. E. Rep. 222. See, also, *Jennings v. Pearce*, 1 Ves. Jr. 447. United States Equity Rule 18 requires the defendant, unless the time shall be otherwise enlarged for cause shown by a judge of the court upon motion for that purpose, to file his plea, demurrer or answer to the bill on the rule-day next succeeding that of entering his appearance, in default whereof the bill may be taken *pro confesso*. See §§ 209, 210, *infra*. "By our act of 1801, chapter 6, section 12, and the rules of practice of our courts of chancery, on failure of the defendant to plead, answer or demur at the first term to which the process is returnable, or within such further time as may be allowed for doing so, the bill may be taken *pro confesso*. This mode of practice, however, is of such serious consequence to the rights of the parties that it is both proper and necessary that it should be strictly confined within the limits prescribed by the statute and rules of the court." *Lanum v. Steele*, 10 Humph. (Tenn.) 279. See, also, *Buttler v. Mathews*, 19 Beav. 549.

<sup>1</sup> *Barrett v. McAllister*, 88 West Va. 738; s. c., 11 S. E. Rep. 220; *O'Brien v. Stephens*, 11 Gratt. 610; *Mahany v. Kephart*, 15 West Va. 609. See § 186, *supra*. Under code of Georgia, section 4208, providing for the tak-

ing of a bill *pro confesso*, no order need be taken or granted for that purpose; but a decree can be entered upon proper affidavit by complainant, or his solicitor in his absence. *Miller v. Wilkins*, 79 Ga. 675; s. c., 4 S. E. Rep. 261. Defendant was summoned to answer a bill in equity at rules on September 3. On the third day of the next term, which began September 17, a decree *pro confesso* was taken against her. This was held erroneous, under code of Missouri, section 1889, allowing a party until the next monthly rule-day to plead, etc. *Jones v. Hervey*, 65 Miss. 99; s. c., 5 So. Rep. 517. Where, in a chancery cause, there is an answer on file, it is error to default defendant. *Griswold v. Brock*, 29 Ill. App. 423. Under equity rule 44 of the Supreme Court of Florida, a decree *pro confesso* cannot be entered for the want of an appearance of the defendant, but only for a failure to file a demurrer, plea or answer. *Lente v. Clarke*, 28 Fla. 515; s. c., 1 So. Rep. 149; *Johnson v. Johnson*, 28 Fla. 418; s. c., 2 So. Rep. 834. Where, at the time the subpoena was served, the bill failed to show jurisdiction of the defendant corporation, and the marshal's return showed service only on one who was separately named as a defendant, a decree *pro confesso* against the corporation was set aside. *Non-Magnetic Watch Co. v. Ass'n Horlogere Suisse of Geneva*, 45 Fed. Rep. 210.

<sup>2</sup> *Platt v. Griffith* (1876), 27 N. J. Eq. 207.

as confessed in other parts not answered.<sup>1</sup> An order to take a decree *pro confesso* unless the defendant answers it by a day given cannot be anticipated, and a decree *pro confesso* passed before the expiration of the time.<sup>2</sup>

**§ 193. Affidavit of regularity.**—As a matter of good practice it is better to file an affidavit of non-appearance before proceeding to enter defendant's non-appearance and taking the bill as confessed.<sup>3</sup> It is improper to detail the proceedings at length in an affidavit of regularity. The affidavit should merely state that the bill has been taken as confessed upon a personal service of the subpoena, or on a voluntary appearance of the defendant, or upon a proceeding against him as an absentee, as the case may be, and that all the proceedings to take the bill as confessed are regular — except in special cases where the solicitor wishes to submit the question of regularity to the court.<sup>4</sup> The New Jersey statute directs that a decree *pro confesso* may be taken against a non-resident failing to appear, after proof of service of the publication of the order for his appearance, "to the satisfaction of the chancellor," and the order of the chancellor declaring that such publication has been made to his satisfaction, and directing a decree, is conclusive upon the question as between such non-resident defendant and the purchaser under the decree.<sup>5</sup> The defendant has the whole of the last day specified in the order to answer in which to serve his answer, and it is irregular in the complainant's solicitor to enter an order to take the bill as confessed upon an affidavit made upon the last day upon which the defendant can serve his answer, even though such affidavit was made at or after nine o'clock in the

<sup>1</sup> *Weaver v. Livingston*, Hopk. Ch. 595. See, also, *Suydam v. Beals*, 4 McLean, 12, 15; *Hale v. Continental Life Ins. Co.*, 20 Fed. Rep. 344; *Pegg v. Davis*, 2 Blackf. (Ind.) 181.

<sup>2</sup> *Fitzhugh v. McPherson*, 9 Gill & J. 52. If the defendant after an irregular decree *pro confesso* has been entered against him appears by solicitor and makes motions in the cause without objection to the ir-

regularity in the decree, he will be held to have waived them and cannot take advantage of them on error. *Bank v. St. John*, 25 Ala. 566.

<sup>3</sup> *Low v. Mills*, 61 Mich. 35; s. c., 27 N. W. Rep. 877, where, however, it was held not essential and its omission not error.

<sup>4</sup> *Nott v. Hill* (1836), 6 Paige, 9.

<sup>5</sup> *McCahills v. Equitable L. Ass. Soc.* (1875), 26 N. J. Eq. 581.

evening. He should wait until the full time has expired before making his affidavit.<sup>1</sup>

§ 194. Decree *pro confesso* for defective answer.—Where an answer was put in without the defendant's signature, it was ordered to be taken off the files for irregularity; and as there was no suggestion that there was any defense to the suit, the answer having evidently been put in for mere delay, it was made a part of the order that the complainant's bill be taken as confessed for want of an answer.<sup>2</sup> A corporation must appear and answer to the bill, not under oath, but under its common seal. An omission thus to appear and answer according to the rules and practice of the court entitles the complainants to enter an order that the bill be taken *pro confesso*.<sup>3</sup> A decree *pro confesso*, signed after the time for answering has expired, is regular though an order for further time to answer be signed and filed on the same day with the signing of the decree. And when the order for time is made without notice, though it be made to appear affirmatively that the order was signed and filed prior to the signing of the decree, the complainant will be entitled to the costs of his proceeding until he is served with a copy or with notice of the order.<sup>4</sup>

<sup>1</sup> Hoxie v. Scott (1841), Clarke's Ch. 457.

<sup>2</sup> Dennison v. Bassford (1839), 7 Paige, 870. "Notwithstanding the opinion of Lord Bathurst expressed in Bacon v. Griffith, 2 Dick. 478, that after exceptions sustained and failure to answer the application should be to take the whole bill for confessed, I can see no reason why the complainant may not elect in such case whether he will insist upon a *pro confesso* to the whole bill or only to the part excepted to. An insufficient answer being legally no answer, the complainant is entitled as a right to a *pro confesso* of the whole bill if he chooses." Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 605, citing Turner v. Turner, 1 Dick. 316; Att'y Gen'l v. Young, 8 Ves. 209; Jopling

v. Stuart, 4 Ves. 619; Trust & Fire Ins. Co. v. Jenkins, 8 Paige, 589; Lea v. Vanbibber, 6 Humph. 18. But it has also been held that he may limit his *pro confesso* to the part to which the exceptions have been sustained. Abergavenny v. Abergavenny, 2 Eq. Ca. Abr. 178; Weaver v. Livingstone, Hopk. Ch. 493. The complainant cannot have an order *pro confesso* until his exceptions for insufficiency are sustained and the defendant has failed to put in a sufficient answer within the time prescribed by law or the order of the court. Smith v. St. Louis Mut. L. Ins. Co., *supra*.

<sup>3</sup> Bronson v. La Crosse &c. R. Co., 2 Wall. 288.

<sup>4</sup> Emery v. Downing (1860), 18 N. J. Eq. 59.

§ 195. When proof of the bill is necessary.—If the allegations in the bill are distinct and positive they may be taken as true without proof.<sup>1</sup> But if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof.<sup>2</sup> In either event, although the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill or from insisting that the averments contained in it do not justify the decree.<sup>3</sup>

§ 196. Effect of answer by one of several defendants.—Where defendants are jointly interested, a decree *pro confesso* as to some merely takes away their standing in court, and disentitles them to appear or be heard on many questions, certainly without an order of court; but the success of the others avails for them, and the bill will be dismissed as to all.<sup>4</sup>

<sup>1</sup> Williams v. Corwin, Hopk. Ch. 471; Central R. Co. v. Central Trust Co., 133 U. S. 88, 91; Harmon v. Campbell, 30 Ill. 25. See, also, Consolidated Electric Storage Co. v. Atlantic Trust Co. (N. J. Ch.), 24 Atl. Rep. 229. When a bill is taken *pro confesso* the complainant is not bound to prove the contract stated in the bill. Douglass v. Evans, 1 Tenn. (Overton), 82. If any particular claim in a bill be not answered the complainant should insist on an answer, and if such answer be refused he may take a decree *pro tanto* by confession; and then if the charge is sufficiently explicit it may be without further proof. But should the complainant, instead of pursuing that course, bring the case to a hearing on the merits, he can only entitle himself to the claim by proving it. Pegg v. Davis, 2 Blackf. (Ind.) 281.

<sup>2</sup> Central R. Co. v. Central Trust Co., 133 U. S. 88, 91; Williams v. Corwin, Hopk. Ch. 471; Pegg v. Davis, 2 Blackf. (Ind.) 281. See, generally, Atkins v. Faulkner, 11 Iowa, 826;

Larkin v. Mann, 2 Paige, 27; Coleman v. Lyne, 4 Rand. 454; Wilkins v. Williams, 4 Porter (Ala.), 245; Singleton v. Gale, 8 Porter (Ala.), 270.

<sup>3</sup> Central R. Co. v. Central Trust Co., 133 U. S. 88, 91.

<sup>4</sup> Kopper v. Dyer, 59 Vt. 477; s. c., 9 Atl. Rep. 4; Clason v. Morris, 10 Johns. 524. See, also, Frow v. De La Vega, 15 Wall. 552; Cunningham v. Steele, 1 Litt. (Ky.) 52; Hanson v. Jeremiah, 2 Bibb, 349; Butler v. Kinzie (Tenn.), 15 S. W. Rep. 1068; Phillips v. Hollister, 2 Cold. (Tenn.) 271; Petty v. Hannum, 2 Humph. (Tenn.) 102, 105; Hennessee v. Ford, 8 Humph. (Tenn.) 500; Cherry v. Clements, 10 Humph. (Tenn.) 552; McDaniel v. Goodall, 2 Cold. (Tenn.) 395; Caldwell v. McFarland, 11 Lea (Tenn.), 467; Smith v. Cunningham, 2 Tenn. Ch. 573; Terry v. Fontaine, 83 Va. 451; s. c., 2 S. E. Rep. 743; Anon., 4 Hen. & M. 476; Findlay v. Sheffy, 1 Rand. (Va.) 78; Cartique v. Raymond, 4 Leigh, 579; Ashby v. Bell, 80 Va. 811.



“Where the complainant is required to make out his case by proof he must do so in every particular as to each party against whom recovery is sought if his suit is of a character that necessarily involves the several defendants in the facts which must bind or relieve all.”<sup>1</sup> Thus where only one of two members of a firm, who are sued jointly on notes given by the firm, answers the bill, and establishes fraud on the part of complainant, judgment should also be rendered in favor of the other defendant, if the facts as to him are the same, though he failed to appear, and a decree *pro confesso* was had as to him.<sup>2</sup> A bill filed against an administrator and others to reach a fund realized from the sale of certain lands made under decree of court in settlement of the estate of a decedent to whom they had, as alleged, been conveyed in fraud of creditors, prayed that the administrator be made a defendant and required to answer under oath, and the administrator did answer under oath denying the fraud. It was held that the complainant was not entitled to a decree *pro confesso* against the defendants who failed to answer, when the evidence showed that no fraud was committed.<sup>3</sup> But this doctrine has never been applied to the case of an answer by a defendant who has distinct rights and no joint or common interest with the party who files the answer.<sup>4</sup>

<sup>1</sup> *Butler v. Kinzie* (Tenn.), 15 S. W. Rep. 1068. . . . “If a *pro confesso* is to operate as an estoppel at all times and under all circumstances without qualification, then courts must sit like fangless lions while fraud and falsehood prevail within their precincts and defiantly taunt their helplessness to uphold the majesty and power of the law to do right and justice. Technicalities should never be allowable as shields for wrong but only for the protection of merit. When they present themselves as barriers to justice, courts should without hesitation cut through them to the right, that the ends and purposes of equity and good conscience may be attained and served.” Turner, C. J., in *Butler v.*

*Kinzie, supra* (Tenn.), 15 S. W. Rep. 1068.

<sup>2</sup> *Butler v. Kinzie* (Tenn.), 15 S. W. Rep. 1068; *Petty v. Hannum*, 2 Humph. (Tenn.) 102, 105.

<sup>3</sup> *Terry v. Fontaine's Adm'r*, 83 Va. 451; s. c., 2 S. E. Rep. 743.

<sup>4</sup> *Butler v. Kinzie* (Tenn.), 15 S. W. Rep. 1068; *Simpson v. Moore*, 5 Lea (Tenn.), 876; *Andress v. Lee*, 1 Dev. & Bat. Eq. 318, 321, where, however, the court said:—“Because of the obvious equity of such a course we are bound to hold that the defense inures to the benefit of all defendants having a joint interest in the subject-matter.” Upon a bill for specific performance and for a compensation in damages against the vendor and a subsequent purchaser with notice,

§ 197. **Decrees pro confesso against infants.**—“It is a well-settled principle . . . that before a decree can pass against an infant defendant in chancery full proof must be made against him and that proof preserved in the record or decree. No presumption can be indulged that proof was made against the infant defendant unless it is shown by the record. The answer of a guardian *ad litem* admitting the truth of the charges in the bill cannot affect the infant's rights, but with respect to them all the allegations must be proved with the same strictness as if the answer had interposed a direct and positive denial of their truth; nor can a default or a decree *pro confesso* be entered against the infant.”<sup>1</sup> It is clear that where no answer has been put in by a guardian *ad litem* a decree cannot be rendered against infants by default, but the plaintiff must prove his case. “This is a settled principle both in England and America.”<sup>2</sup> When notice by publication against infant non-resident defendants is nugatory and void, the appointment of a guardian *ad litem* for them, based upon such publication, is also void, if they are not in court amenable to any of its orders.<sup>3</sup>

§ 198. **Effect of amending the bill.**—It was held in the New York court of chancery that where the complainant amends his bill after a personal service of a subpoena upon the defendant, who neglects to appear in the suit, the service of a new subpoena is not necessary to authorize the entry of an order to take the amended bill as confessed. Such an order applies to the bill as it then stands, including amendments that have been made;<sup>4</sup> and where the complainant amends

the latter admitting the facts and notice thereof in his answer, and the bill being taken as confessed against the other defendants, the proper decree is for a specific performance by the purchaser and not a decree for compensation in damages. *Boyd v. Vanderkemp*, 1 Barb. Ch. 273.

<sup>1</sup> *Chaffin v. Kimball*, 23 Ill. 36, 38; *McClay v. Norris*, 4 Gilm. (Ill.) 370; *Cochran v. McDowell*, 15 Ill. 10; *Greenough v. Taylor*, 17 Ill. 602; *Tuttle v. Garrett*, 16 Ill. 354; *Hitt v.*

*Ormsbee*, 12 Ill. 169; *Masterson v. Wiswold*, 18 Ill. 49; *Reaves v. Fielden*, 18 Ill. 77; *Ingersoll v. Ingersoll*, 42 Miss. 155. See *O'Hara v. MacConnell*, 93 U. S. 151; *Mills v. Dennis*, 3 Johns. Ch. 367; *Carneal v. Sthreshley*, 1 A. K. Marsh. 471.

<sup>2</sup> *Massie v. Donaldson*, 8 Ohio, 377, 381.

<sup>3</sup> *McDermaid v. Russell*, 41 Ill. 489, 491; *Campbell v. Campbell*, 63 Ill. 462; *Chambers v. Jones*, 72 Ill. 275.

<sup>4</sup> *Bond v. Howell* (1844), 11 Paige,

his bill after answer, if a further answer to the amended bill is not waived, the defendant must put in a further answer to the amendments, or the complainant will be entitled to an order taking the whole bill as amended confessed.<sup>1</sup> But if an original bill is taken as confessed and an amended bill is subsequently filed making other persons parties, the order *pro confesso* is thereby opened.<sup>2</sup> It is declared in several cases in Kansas that if a defendant has been personally served with a summons the bill cannot be materially changed without notice when the defendant is in default or is absent.<sup>3</sup>

**§ 199. Rights of the defendant after decree pro confesso.** If a defendant has appeared and the bill is taken for confessed against him for want of an answer, he still has the right to be heard upon the form of the decree and to appeal therefrom.<sup>4</sup> A defendant who has appeared by a solicitor is entitled to notice of all the subsequent proceedings in the cause, although he suffers the complainant's bill to be taken as confessed; and a decree taken against him *ex parte* without notice to his solicitor of the hearing will be set aside as irregular.<sup>5</sup> When the

238. But see *Harris v. Deitrich*, 29 Mich. 366. Where a bill is amended after appearance, it is necessary to enter an order that the party answer the bill as amended, and notice is to be given of the same with a copy of the amended bill. It cannot in such a case be taken *pro confesso* upon an order to answer entered prior to the amendment. *Jackson v. Edwards* (1836), 2 Edw. Ch. 582.

<sup>1</sup>*Trust & Ins. Co. v. Jenkins* (1841), 8 Paige, 589; *Davis v. Davis*, 2 Atk. 23; *Bacon v. Griffith*, 4 Ves. 619, n.; *Jopling v. Stewart*, 4 Ves. Jr. 619. But see *Suydam v. Beals*, 4 McLean, 12, 15.

<sup>2</sup>*Bank of Utica v. Finch* (1845), 1 Barb. Ch. 75. In *Weightman v. Powell*, 2 De G. & S. 570, it was held that after an order to take the bill *pro confesso* the bill cannot be amended even to the extent of correcting a clerical error without vitiating the proceedings and rendering

the order useless. The vice-chancellor said the difficulty was that what the complainant called a clerical error might not be so regarded by a defendant. Merely putting in an answer is not sufficient to overrule an order to take a bill *pro confesso*. *Carter v. Torrance*, 11 Ga. 654.

<sup>3</sup>*Beecher v. Ireland*, 46 Kan. 97; s. c., 26 Pac. Rep. 448; *Haight v. Schuck*, 6 Kan. 192; *Alvey v. Wilson*, 9 Kan. 401; *Railroad Co. v. Van Riper*, 19 Kan. 817.

<sup>4</sup>*Blanchard v. Cooke*, 144 Mass. 207; *Frow v. De La Vega*, 15 Wall. 552; *Butterworth v. Hill*, 114 U. S. 128. As to what objections may be made on appeal, see *O'Hara v. McConnell*, 93 U. S. 150; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530; *Masterson v. Howard*, 18 Wall. 99; *Ohio & C. R. Co. v. Central Trust Co.*, 133 U. S. 88.

<sup>5</sup>*Hart v. Small*, 4 Paige, 551. It seems that where a bill is taken as

order of reference on a decree *pro confesso* directs that notice of proceeding before the master be given to the defendant, a rule to confirm the report of the master *nisi* should be entered on the part of the complainant.<sup>1</sup>

§ 200. Decree *pro confesso* as an estoppel.—As a rule a decree *pro confesso* will estop a party from resisting liability when the facts charged make a case against him.<sup>2</sup> The allegations of the bill cannot be questioned in subsequent proceedings in the court below or upon appeal. Anything in the allegations themselves tending to show that the decree is erroneous is assignable for error; but facts not found in the allegations of the bill are inadmissible to affect the decree.<sup>3</sup> Heirs and personal representatives of a defendant who has suffered a bill to be taken as confessed against him are bound by his implied admissions arising from his neglect to put in an answer.<sup>4</sup> But “a decree *pro confesso* is not a decree as of course, according to the prayer of the bill, nor merely such as the complainant chooses to take it; but it is made by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true.”<sup>5</sup> The decree establishes facts which are well pleaded, but does not aid or supplement a bill which fails to state a good cause of action.<sup>6</sup>

confessed against a defendant before his death, and after his death the suit is revived against his heirs or his personal representatives, they must apply to vacate the order taking the bill as confessed if they wish to controvert the allegations in the bill or to set up any defense except such as has arisen since the entry of the order. *Christie v. Bishop* (1845), 1 Barb. Ch. 105.

<sup>1</sup> *Brundage v. Goodfellow*, 8 N. J. Eq. 518. That a defendant is entitled to notice, see *Bennett v. Hoefner*, 18 Blatchf. 341, 342.

<sup>2</sup> *Butler v. Kinzie* (Tenn.), 15 S. W. Rep. 1068; *Stone v. Duncan*, 1 Head (Tenn.), 108.

<sup>3</sup> *Thompson v. Wooster*, 114 U. S. 104.

<sup>4</sup> *Christie v. Bishop*, 1 Barb. Ch. 105.

<sup>5</sup> *Central R. Co. v. Central Trust Co.*, 133 U. S. 83, 90.

<sup>6</sup> *Keil v. West*, 21 Fla. 508, 520; *Gault v. Hoagland*, 25 Ill. 266; *Gentry v. Rogers*, 40 Ala. 442, 446; *White v. Lewis*, 2 A. K. Marsh. 123; *Robinson v. Townshend*, 3 Gill & J. 413; *McDonald v. Mobile Life Ins. Co.*, 56 Ala. 468; *Central R. Co. v. Central Trust Co.*, 133 U. S. 83, 91; *Cowan v. Wells*, 5 Lea (Tenn.), 682. A defendant in equity, who suffers a default, does not admit facts not alleged in the bill, nor conclusions of the pleader from the facts stated. *Cramer v. Bode*, 24 Ill. App. 219.

In the latter case the decree would stand in point of legal efficacy precisely where a decree stands, after pleadings and proof, which is founded on a cause of action not stated in the bill.<sup>1</sup>

§ 201. The same subject continued.—“A judgment *pro confesso* appearing in the record in which it is recited that publication was made in a newspaper in accordance with an order of the court requiring defendants to appear and make defense at a given term, it is sufficient proof that publication was made. And it is immaterial whether this is made on the minutes of the court or at rules by the master.<sup>2</sup> But if the judgment *pro confesso* does not show all these facts of publication, it will still be sufficient evidence of publication if it recite that publication was duly made or regularly made.<sup>3</sup> So if publication is recited as having been made it will be presumed to have been made according to law.<sup>4</sup> And finally, if no judgment *pro confesso* appears, and it is recited in the final decree that publication has been made, this is sufficient.<sup>5</sup> Or if there is no recital of publication or of the terms of any judgment *pro confesso*, and the final decree recites that the cause was heard on judgment *pro confesso*, it will be presumed that a regular judgment for confession was taken, and that the judgment recited publication according to law, and that publication was in fact made according to the presumed recitals.”<sup>6</sup>

§ 202. Opening decrees *pro confesso* — The general rule.—Great liberality has been exercised in the opening and correcting of decrees before enrollment, and even afterwards, where

<sup>1</sup> Consolidated Electric Storage Co. v. Atlantic Trust Co. (N. J. Ch.), 24 Atl. Rep. 229; Chadwell v. McCall, 1 Tenn. Ch. 640; McGavock v. Elliott, 8 Yerg. (Tenn.) 378; Ross v. Ramsey, 8 Head (Tenn.), 15; §§ 99, 100, *supra*.

<sup>2</sup> Robertson v. Winchester, 85 Tenn. 171, 184, 185; Mitchell v. McKinney, 6 Heisk. 87; Allen v. Gilliland, 6 Lea, 582, 583.

<sup>3</sup> Robertson v. Winchester, 85 Tenn. 171, 184, 185; Walker v. Cottril, 6 Bax. (Tenn.) 261; Netherland v. John-

son, 5 Lea (Tenn.), 842; Martin v. Porter, 4 Heisk. 415.

<sup>4</sup> Robertson v. Winchester, 85 Tenn. 172, 184, 185; Kilcrease's Heirs v. Blythe, 6 Humph. 389, 390.

<sup>5</sup> Robertson v. Winchester, 85 Tenn. 171, 185; Gilchrist v. Cannon, 1 Cold. 587; Kyle v. Phillips, 6 Bax. 45.

<sup>6</sup> Robertson v. Winchester, 85 Tenn. 171, 185; Kilcrease's Heirs v. Blythe, 6 Humph. 389, 390; Sparks v. White, 7 Humph. 91, 92; Mitchell v. McKinney, 6 Heisk. 87.

the decree has been taken *pro confesso* for the purpose of rectifying mistakes apparent upon the face of the proceedings, or where there is a clear case of surprise and merits.<sup>1</sup> There is no general and positive rule upon the subject. Whether the court will interfere to release a party from the consequences of his default must depend upon sound discretion arising out of the circumstances of the case.<sup>2</sup> In one case Lord Thurlow observed that if a defendant comes in after a bill has been taken *pro confesso* upon any reasonable ground of indulgence and pays costs, the court will attend to his application if the delay has not been extravagantly long.<sup>3</sup> And Lord Hardwicke said it was a question on which side the greatest in-

<sup>1</sup> *Carpenter v. Muchmore* (1862), 15 N. J. Eq. 123. After a decree *pro confesso*, order of reference, and report of master, the decree will be opened and the defendant let in to answer on terms if the equity of the case requires such relaxation of the rules of the court. *Williamson v. Sykes* (1860), 18 N. J. Eq. 182. That the decrees *pro confesso* will be opened in proper cases, even after enrollment, see *Embury v. Bergamini*, 24 N. J. Eq. 328; *Millspaugh v. McBride*, 7 Paige, 509; *Kemp v. Squire*, 1 Ves. Sr. 204; *Beckman v. Peck*, 3 Johns. Ch. 415; *Erwin v. Vint*, 6 Munf. 267; *Tripp v. Vincent*, 8 Paige, 176. But not when the bill has been taken as confessed after appearance. *Maynard v. Pereault*, 80 Mich. 160. It is not a matter of course to set aside an order taking the bill as confessed merely upon an affidavit of merits, even before a decree in the case. *Wells v. Cruger*, 5 Paige, 164. "The whole current of authorities goes to show that there is a difference between decrees by default, orders that the bill be taken *pro confesso* and actual decrees *pro confesso*. The last is considered, when compared with the others, as sacred, and to be disturbed only for weighty reasons."

*Robertson v. Miller* (1836), 8 N. J. Eq. 451, 454.

<sup>2</sup> *Carter v. Torrance*, 11 Ga. 655, *Wooster v. Woodhull*, 1 Johns. Ch. 589; *Russell v. Waite*, Walk. Ch. 31; *Pittman v. McClellan*, 55 Miss. 299; *Hearne v. Ogilvie*, 11 Ves. Jr. 76; *Warner v. Ogilvie*, 8 Paige, 406; *Magowan v. James*, 12 Sm. & M. 448; *Parker v. Grant*, 1 Johns. Ch. 630. The application should not be granted when the result must be injurious to the complainant. *Robertson v. Miller*, 8 N. J. Eq. 451. That the exercise of discretion is not reviewable, see *Buchanan v. McManus*, 3 Humph. (Tenn.) 449; *Chandler v. Jobe*, 5 Lea, 593, except in extraordinary cases. s. c. In Mississippi the statute provides that "such *pro confesso* so taken shall not be set aside except upon good cause shown, supported by affidavit of the party or his solicitor." This is mandatory, and converts what was before very much a matter of discretion into a matter of duty, so that if good cause be shown the *pro confesso* must be set aside. *Pittman v. McClellan*, 55 Miss. 299.

<sup>3</sup> *Williams v. Thompson*, 2 Bro. Ch. 279; *Wooster v. Woodhull*, 1 Johns. Ch. 589.

convenience would lie, and he finally opened the cause on payment of the cost of the default and of all subsequent proceedings, notwithstanding two years had elapsed after the decree had been made absolute on account of the defendant's not appearing at the hearing.<sup>1</sup>

§ 203. Who may apply to open decrees *pro confesso*.—A party who is in contempt for disobeying an order of the court cannot obtain relief, which rests upon the favor of the court, until the contempt be purged. On that ground a motion to open a default for not answering was denied.<sup>2</sup> Where in a suit relating to property a decree *pro confesso* was taken against the defendant for want of an answer, it was held that his assignee in insolvency *pendente lite* might be admitted as a party and be allowed to file an answer and try the case upon its merits.<sup>3</sup> Where a mortgagor sells his interest in the premises after a decree of foreclosure against him *pro confesso*, the grantee can have no better title to open the decree than the mortgagor would have.<sup>4</sup>

§ 204. Grounds for opening decrees *pro confesso*.—Where on the service of the subpoena the defendant's solicitor wrote

<sup>1</sup>Cunningham v. Cunningham, Ambler, 89; s. c., Dick. 145. Ordinarily in England a party, whether plaintiff or defendant, who had made default at the hearing and who had thereby suffered his bill to be dismissed or a decree to be made absolute against him, was relieved upon the usual terms of payment of costs. Robson v. Cramell, Dick. 61; Kemp v. Squire, Dick. 181; Frey v. Frosser, Dick. 298; Ferran v. White, Dick. 782. The language of the Tennessee statute is that non-residents "may be admitted to answer the bill upon petition showing merits and giving security for the payment of costs." "He has first to acquire his *status* by the presentation of a petition. If the petition shall be adjudged good and sufficient, then he is admitted to

answer. . . . The purpose of the statute was to place the non-resident who comes within its saving in the same plight as if the case were then newly begun when he presents his petition and is admitted to defend; that is, to place him in the same *status* as if the cause were just standing for defense. It is obvious that by this construction he could make an issue of either law or fact. Any other construction would be but to offer a benefit with one hand and withhold it with the other." Brown v. Brown, 2 Pickle (Tenn.), 277; s. c., 6 S. W. Rep. 869.

<sup>2</sup>Ellingwood v. Stevenson (1846), 4 Sandf. Ch. 366.

<sup>3</sup>Blanchard v. Cook (1887), 144 Mass. 207.

<sup>4</sup>Watt v. Watt (1847), 2 Barb. Ch. 371.



a letter to the solicitor of the plaintiff requesting him to cause the appearance of the defendant to be entered and send him a copy of the bill; and the plaintiff's solicitor sent him a copy of the bill accordingly, but neglected to enter the defendant's appearance and proceeded to have the bill taken *pro confesso*, and a final decree was entered in the cause, it was held that the sending of a copy of the bill and requesting that an answer might be put in was to be deemed an admission of an appearance or a waiver of the formal entry of it, and that the defendant was therefore to be considered as in court and entitled to be served with a rule to put in an answer before the bill could be taken *pro confesso*, and the order for taking the bill as confessed and all subsequent proceedings were set aside for irregularity.<sup>1</sup>

§ 205. The same subject continued.— Where a defendant has had an opportunity to set up his discharge under the bankrupt act as a technical defense, and has neglected to do so, the court will not open a regular default for the purpose of enabling him to set it up.<sup>2</sup> A decree fairly and regularly obtained by default for want of an answer will not be set aside to let in a defense founded on a fraudulent speculation.<sup>3</sup> Where the principal witness in support of the bill had died after the bill was taken *pro confesso*, an application by the defendant to be let in to make a defense was refused.<sup>4</sup> It is the settled practice of the court not to set aside a regular order taking a bill as confessed to enable a defendant to set up an unconscientious defense. And where the defense is usury, the court requires the defendant to undertake that he will not avail himself of that defense, except as to the amount of the usurious premium.<sup>5</sup> The court will not set aside a regu-

<sup>1</sup> *Livingston v. Woolsey* (1820), 4 Johns. Ch. 365. A decree *pro confesso* was opened, with leave to answer, on the ground of surprise; no negligence being attributable to the defendants. *Miller v. Wright* (1874), 25 N. J. Eq. 340.

<sup>2</sup> *Freeman v. Warren*, 3 Barb. Ch. 635.

<sup>3</sup> *Parker v. Grant*, 1 Johns. Ch. 680.

<sup>4</sup> *Wooster v. Woodhull*, 1 Johns. Ch. 589.

<sup>5</sup> *Quincy v. Foot* (1846), 1 Barb. Ch. 496; *National Fire Ins. Co. v. Sackett*, 11 Paige, 660. After a default has been regularly entered in a foreclosure suit, it will not be opened for the purpose of enabling the defendant to set up as a defense that the mortgage was given in violation of

- lar decree by default on the application of the defendant, for the mere purpose of enabling him to enforce a forfeiture in a suit at law.<sup>1</sup>

§ 206. **Requisites of the application to open a decree pro confesso.**— An application by a defendant to open a decree *pro confesso* and file an answer may be either by petition properly verified, or upon motion sustained by affidavit. The former mode is the more usual and formal, but either may be resorted to.<sup>2</sup> A final decree which has been regularly entered, upon a bill taken as confessed, will not be set aside upon the mere affidavit of the defendant that he is advised he has a

the restraining law; except upon the terms of paying the money or property actually received from the mortgagee. *Bard v. Fort*, 8 Barb. Ch. 682.

<sup>1</sup> *Baxter v. Lansing*, 7 Paige, 850. The defendant's solicitor in a foreclosure suit obtained an order extending the time for answering; and filed his answer (setting up usury) within the time limited, but did not serve the order on complainant's solicitor, who entered a decree *pro confesso* after the original time for answering had expired. All the subsequent proceedings in the cause were had without his knowledge of the existence of such order or answer. It was held that the final decree was regular, and the sheriff's sale under it would not be set aside, the purchaser, too, having laid out money on the property since he bought it. *Wrigley v. Jolley*, 36 N. J. Eq. 168. Mere poverty and consequent inability to employ counsel is not ground for opening a default. *Keil v. West*, 21 Fla. 508. See, also, *Robertson v. Miller*, 8 N. J. Eq. 451. Where on a bill to quiet title a *pro confesso* order was entered for plaintiff after service of subpoena on defendants, and a copy of the bill on their attorney, who made affidavit that defendants instructed him to

make a settlement without making any defense, the court did not abuse its discretion in refusing to set aside the order *pro confesso*, especially where the proposed answer failed to meet the case made by the bill. *Mills v. McLeod* (Mich.), 49 N. W. Rep. 184.

<sup>2</sup> *Emery v. Downing* (1860), 13 N. J. Eq. 59, 60. In the federal courts the proper method of relief is by motion to the court to vacate the decree. *Stewart v. French*, 22 Wall. (1875), 238. But not after the term has expired. *Allen v. Wilson*, 21 Fed. Rep. 881. Where a decree has been rendered in a cause on a demurrer to the bill, an answer, a supplemental and amended answer, and replications thereto, on depositions taken, and the report of a commissioner, which has been excepted to, the exceptions acted on, and the principles of the cause have been adjudicated, such decree cannot be reversed on motion under Code of West Virginia, chapter 184, section 5, which provides that the court in which there is a judgment by default, or a decree on a bill taken for confessed, may, on motion, reverse such judgment or decree for certain errors, *Rader v. Adamson* (West Va.), 16 S. E. Rep. 808, because it was really a decree on the merits.

good defense on the merits. He must either state the nature and facts of his defense in the affidavit, or he must move upon the sworn answer which he proposes to put in, so that the court can see what the defense is. And in either case the complainant is entitled to service of a copy of the answer or affidavit upon which the motion is based.<sup>1</sup> A regular decree entered by default will not be opened to let in a defense of usury, without an offer on the part of the defendant to waive the forfeiture and to consent to a decree for the payment of what is equitably due.<sup>2</sup>

§ 207. Terms upon which decrees pro confesso are opened. Where the complainant's proceedings are strictly regular the

<sup>1</sup> Goodhue v. Churchman (1846), 1 Barb. Ch. 596; Winship v. Jewett, 1 Barb. Ch. 173; Montgomery v. Olwell, 1 Tenn. Ch. 172. "The showing as to merits must be of facts stating a defense and in a distinct and satisfactory manner." Keil v. West, 21 Fla. 508. In Wells v. Conger, 5 Paige, 164, it was held that he must, upon the motion, produce the answer he proposes to put in. See, also, Long v. Long, 59 Mich. 296; Mills v. McLeod (Mich.), 49 N. W. Rep. 184; Emery v. Downing, 18 N. J. Eq. 59. But in Tennessee this is not necessary until it is determined by the court whether he is entitled to make defense by answer. Metcalf v. Landers, 8 Bax. (Tenn.), 85. See Cook v. Dewa, 2 Tenn. Ch. 496; Tatten v. Nance, 8 Tenn. Ch. 264, holding that the affidavit must be made by the defendant in person unless the facts are peculiarly within the knowledge of some other person swearing to it. "The object of presenting the answer at the time is twofold: first, not to delay the complainant in his suit; second, that the court may see that a meritorious defense is made." Pittman v. McClellan, 55 Miss. 290, and cases there cited. It should be verified though the bill waives an answer under oath. Gibson's Suits in Chancery, § 285.

"Under the seventeenth equity rule a defendant may, by special leave of the court, at any time after a bill is taken *pro confesso* and before final decree, either answer, plead or demur to the bill, but to entitle him to do so he should, according to long established practice, assign some satisfactory reason in his application for leave why the delay and failure to appear and answer have occurred, and the facts should be verified by oath. But the sufficiency of the reasons assigned is not reviewable by this court, nor are the terms upon which the party may be allowed to answer, plead or demur. These are matters of practice properly within the sound discretion of the court or judge to whom the application is made." Belt v. Bowie, 65 Md. 350, holding that under permission to plead the defendant may plead the statute of limitations. "Cross-affidavits to resist the setting aside of a *pro confesso* are of doubtful and dangerous tendency, and should not be allowed." Gibson's Suits in Chancery, § 285, note 2, at p. 209, citing Buchanan v. McManus, 8 Humph. (Tenn.) 449; Brown v. Brown, 2 Pickle (Tenn.), 304.

<sup>2</sup> Watt v. Watt (1847), 2 Barb. Ch. 871.

decree is opened upon the payment of costs.<sup>1</sup> But where a sole defendant resided out of the State and no foreign publication was ordered or notice given to him, costs on opening the decree were ordered to abide the event of the suit.<sup>2</sup> Where a defendant in a foreclosure suit, who was proceeded against as an absentee, applied to be let in to defend, after decree and before a sale of the mortgaged premises, and did not swear to a defense on the merits, he was required to pay the costs already accrued, subsequent to the time of his appearance, and also to give security to pay the future costs of the suit if he failed to succeed in his defense. If he swore to a good defense upon the merits and stated what it was, the court would not require him to pay the costs, where he applied upon the first opportunity after he had notice of the proceedings against him, although the complainant denied upon oath that any such defense existed. But the court in such a case might require the absentee to give security to pay the costs already accrued and the costs of the future litigation if he were defeated in the suit.<sup>3</sup>

§ 208. Opening decrees on account of defective process.— A decree *pro confesso* will not be opened because of a defect in the subpoena where the defendant appeared.<sup>4</sup> Where a copy of subpoena to appear and answer was served in blank as to the return day and month, a decree *pro confesso* taken under it was set aside.<sup>5</sup>

<sup>1</sup> Oram v. Dennison, 18 N. J. Eq. 488. See, also, Wooster v. Woodhull, 1 Johns. Ch. 589. The "terms are that the defendant shall pay costs occasioned by his default and incident to the relief." Pittman v. McClellan, 55 Miss. 299.

<sup>2</sup> Oram v. Dennison, 18 N. J. Eq. 488.

<sup>3</sup> Hartwell v. White (1841), 9 Paige, 868.

<sup>4</sup> Keil v. West, 21 Fla. 508.

<sup>5</sup> Arden v. Walden (1888), 1 Edw. Ch. 681. But in Gould v. Castel, 47 Mich. 604: s. c., 11 N. W. Rep. 408, a subpoena was issued in due form and returned with regular proof of per-

sonal service. The copy served on the defendant was not a true copy, as it contained no return day whatever. The defendant, however, allowed the complainant to go on and take a decree *pro confesso* on July 1, 1880. On December 18th following he moved in person to vacate the proceedings subsequent to the bill and issue of subpoena on the ground of the defect in the copy of the subpoena. He made no showing of merits nor tendered any answer, neither did he suggest any excuse or explanation for his delay. The court said: — "We think the defendant was guilty of gross laches and was in

§ 209. Practice in taking bills pro confesso in the federal courts.—The practice in taking decrees *pro confesso* and the bearing of the United States equity rules upon the subject was thus described by Mr. Justice Bradley:<sup>1</sup> —“By the early practice of the civil law, failure to appear at the day to which the cause was adjourned was deemed a confession of the action; but in later times this was changed, so that the plaintiff, notwithstanding the contumacy of the defendant, only obtained judgment in accordance with the truth of the case as established by an *ex parte* examination.<sup>2</sup> The original practice of the English court of chancery was in accordance with the later Roman law.<sup>3</sup> But for at least two centuries past bills have been taken *pro confesso* for contumacy.<sup>4</sup> Chief Baron Gilbert says:—‘Where a man appears by his clerk in court, and after lies in prison, and is brought up three times to court by *habeas corpus*, and has the bill read to him and refuses to answer, such public refusal in court does amount to the confession of the whole bill. Secondly, when a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure to the sequestration, there also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared and departs in despite of the court and withstands all its process without answering.’<sup>5</sup> Lord Hardwicke likened a decree *pro confesso* to a judgment by *nil dicat* at common law and to judgment for plaintiff on demurrer to the

fault by lying by and not moving on his own contention in regard to the defect of the process.” See, also, *Long v. Long*, 59 Mich. 296; *Benedict v. Thompson*, Walk. Ch. 447; *Hart v. Lindsay*, Walk. Ch. 74, 75; *Keil v. West*, 21 Fla. 508. A writ and subpoena having been issued without the required revenue stamp, the defendant neglected to answer within the prescribed time, because he supposed the time would not begin to run until the writ was stamped. In this he mistook the law, and a stamp having been affixed and decree *pro confesso* taken, he moved to open the same

and be allowed to answer. The court said:—“In order to open a decree regularly entered it is necessary that it appear that the defendant has some good defense and what that defense is.” He was allowed fifteen days to make the proper affidavit,—such affidavit to be entitled in the cause. *Disbrow v. Johnson* (1866), 18 N. J. Eq. 86.

<sup>1</sup> In *Thomson v. Wooster*, 114 U. S. 104, 110 *et seq.*

<sup>2</sup> Keller, *Proced. Rom.*, § 69.

<sup>3</sup> *Hawkins v. Crook*, 2 P. Wms. 556.

<sup>4</sup> *Hawkins v. Crook*, 2 P. Wms. 556.

<sup>5</sup> *Forum Romanum*, 86.

defendant's plea.<sup>1</sup> It was said in *Hawkins v. Crook*<sup>2</sup> that 'the method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts at law, where, if the defendant makes default by *nil dicit*, judgment is immediately given in debt or in all cases where the thing demanded is certain; but where the matter sued for consists in damages, a judgment interlocutory is given, after which a writ of inquiry goes to ascertain the damages, and then the judgment follows.' The strict analogy of this proceeding in actions at law to a general decree *pro confesso* in equity in favor of the complainant, with a reference to a master to take a necessary account or to assess unliquidated damages, is obvious and striking. . . . We may say that to take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true, and that a decree *pro confesso* is a decree based on such statements assumed to be true,<sup>3</sup> and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. 'It cannot be impeached collaterally, but only upon a bill of review or [a bill] to set it aside for fraud.'"<sup>4</sup>

<sup>1</sup> *Davis v. Davis*, 2 Atk. 21.

<sup>2</sup> 2 P. Wms. 556, and quoted in 2 Eq. Ca. Abr. 179.

<sup>3</sup> 1 Smith's Ch. Pr. 158.

<sup>4</sup> 1 Daniell's Ch. Pr. (1st ed.) 696; *Ogilvie v. Herne*, 18 Ves. 563. Continuing, Mr. Justice Bradley, in *Thomson v. Wooster*, 114 U. S. 104, 112, said: — "Such being the general nature and effect of an order taking a bill *pro confesso* and of a decree *pro confesso* regularly made thereon, we are prepared to understand the full force of our rules of practice on the subject. Those rules, of course, are to govern so far as they apply; but the effect and meaning of the terms which they employ are necessarily to be sought in the books of authority to which we have referred. By our rules a decree *pro confesso* may be had if the defendant, on being served with process, fails to appear; or if, having appeared, he fails to plead, demur or answer to the bill

within the time limited for that purpose; or if he fails to answer after a former plea, demurrer or answer is overruled or declared insufficient. The twelfth rule in equity prescribes the time when the subpoena shall be made returnable, and directs that at the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*. The eighteenth rule requires the defendant to file his plea, demurrer or answer (unless he gets an enlargement of the time) on the rule-day next succeeding that of entering his appearance, and in default thereof the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken *pro confesso*, and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill



§ 210. The same subject continued.— After quoting from the rules in equity,<sup>1</sup> “it is thus seen that by our practice,” continued Justice Bradley,<sup>2</sup> “a decree *pro confesso* is not a decree as of course, according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court according to what is proper to be decreed upon the statements of the bill assumed to be true. This gives it the greater solemnity, and accords with the English practice as well as that of New York. Chancellor Kent, quoting Lord Eldon, says: ‘Where the bill is thus taken *pro confesso*, and the cause is set down for hearing, the course<sup>3</sup> is for the court to hear the pleadings and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in case of default by the defendant at the hearing.’<sup>4</sup> Our rules do not require the cause to be set down for hearing at the regular term, but after the entry of the order to take the bill *pro confesso*, the eighteenth rule declares that thereupon the cause shall be proceeded in *ex parte* and *the matter of the bill may be decreed by the court* at any time after the expiration of thirty days from the entry of such order, if it can be done without answer *and is proper to be decreed*. This shows that the matter of the bill ought at least to be opened and explained to the court when the decree is applied for, so

may be decreed by the court at any time after the expiration of thirty days from the entry of said order if the same can be done without an answer and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, etc. And the nineteenth rule declares that the decree rendered upon a bill taken *pro confesso* shall be deemed absolute unless the court shall at the same time set aside the same, or enlarge the time for filing the answer, upon cause shown upon

motion and affidavit of the defendant.”

<sup>1</sup> See the last note in the preceding section.

<sup>2</sup> In *Thomson v. Wooster*, 114 U. S. 104, 113, 119.

<sup>3</sup> “Says Lord Eldon in *Geary v. Sheridan*, 8 Ves. 192.”

<sup>4</sup> *Rose v. Woodruff*, 4 Johns. Ch. 547, 548. No service of any copy of an interlocutory decree taking the bill *pro confesso* is necessary before the final decree. *Bank of United States v. White*, 8 Peters, 262. That a final decree is necessary to give effect to the preliminary order or decree, see *Lockhart v. Horn*, 8 Woods, 542, 548.



that the court may see that the decree is a proper one. The binding character of the decree, as declared in Rule 19, renders it proper that this degree of precaution should be taken. . . . Both parties in this case seem to have taken for granted that the rights of the defendants were the same as if the decree had been made upon answers and proofs. In the English practice, it is true, as it existed at the time of the adoption of our present rules (in 1842), the defendant, after a decree *pro confesso* and a reference for an account, was entitled to appear before the master and to have notice of, and to take part in, the proceedings, provided he obtained an order of the court for that purpose, which would be granted on terms.<sup>1</sup> The former practice in the court of chancery of New York was substantially the same.<sup>2</sup> In New Jersey, except in plain cases of decree for foreclosure of a mortgage (where no reference is required), the matter is left to the discretion of the court. Sometimes notice is ordered to be given to the defendant to attend before the master, and sometimes not; as it is also in the chancellor's discretion to order a bill to be taken *pro confesso* for a default, or to order the complainant to take proofs to sustain the allegations of the bill.<sup>3</sup> As we have seen, by our eighteenth rule in equity it is provided that if the defendant makes default in not filing his plea, demurrer or answer in proper time, the plaintiff may, as one alternative, enter an order as of course that the bill be taken *pro confesso*, '*and thereupon the cause shall be proceeded in ex parte.*' The old rules, adopted in 1822, did not contain this *ex parte* clause; they simply declared that if the defendant failed to appear and file his answer within three months after appearance day, the plaintiff might take the bill for confessed, and that the matter thereof should be decreed accordingly.<sup>4</sup> Under these rules the English practice was left to govern the subsequent course of proceedings, by which, as we have seen,

<sup>1</sup> 2 Daniell's Ch. Pr. (1st ed.) 804; 2 Daniell's Ch. Pr. (2d ed. by Perkins), 1858; Heyn v. Heyn, Jacob, 49.

<sup>2</sup> 1 Hoffman's Ch. Pr. 520; 1 Barb. Ch. Pr. 479.

<sup>3</sup> Nixon Dig., art. Chancery, § 21; Gen. Orders in Chancery, XIV, 8-7;

Brundage v. Goodfellow, 4 Halst. Ch. (8 N. J. Eq.) 518.

<sup>4</sup> See Equity Rules VI and X of 1822; 7 Wheat. VII, and Pendleton v. Evans, 4 Wash. C. C. 885; O'Hara v. McConnell, 93 U. S. 150.

the defendant might have an order to permit him to appear before the master, and be entitled to notice. Whether under the present rule a different practice was intended to be introduced is a question which it is not necessary to decide in this case.”<sup>1</sup>

<sup>1</sup> Mr. Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104, 119, 120.

## CHAPTER VII.

### APPEARANCE.

|   |   |
|---|---|
| § 211. Definition of appearance.                        | § 218. General and special appearance.    |
| 212. Who may appear in a cause.                         | 219. Extending time for appearance.       |
| 213. What constitutes an appearance.                    | 220. Appearance by married women.         |
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| 215. When an appearance must be made.                   | 222. Effect of an appearance.             |
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§ 211. Definition of appearance.— Appearance is the process by which a person against whom a suit has been commenced<sup>1</sup> submits himself to the jurisdiction of the court.<sup>2</sup> An appearance may be special (sometimes termed conditional) or general. A special appearance is ordinarily made for the express purpose of disputing the jurisdiction of the court. A general appearance is one that is not expressly or necessarily limited to the particular matter, motion or pleading constituting the appearance.<sup>3</sup> A party must manifest an intention to appear specially or he will be rigidly held to have appeared generally.<sup>4</sup> The court has power to allow a general notice of appearance to be amended so as to make it special only.<sup>5</sup> Thus, after a general appearance by the defendant, a foreign corporation, the complainant amended his bill so that it was no longer demurrable for want of jurisdiction, and the defendant, upon motion, was permitted to amend his appearance so as to make the same special for the purpose of setting aside

<sup>1</sup> An appearance to a bill not original is subject to the same regulations as an appearance to an original bill. Braithwaite's Pr. 829.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 536.

<sup>3</sup> Gibson's Suits in Chancery, § 246.

<sup>4</sup> Romaine v. Union Ins. Co., 28 Fed. Rep. 625, 638.

<sup>5</sup> Hohorst v. Hamburg-American Packet Co. (N. Y., 1889), 38 Fed. Rep. 278; or to allow an appearance to be withdrawn. Rhode Island v. Massachusetts, 18 Peters, 28.

service of process and to move to dismiss for want of jurisdiction.<sup>1</sup>

§ 212. **Who may appear in a cause.**— Before a person can be held to have appeared in an action his name ought to be found somewhere in the record.<sup>2</sup> If a party is named as a defendant on the record he may, if the plaintiff consents, enter his appearance at the hearing;<sup>3</sup> and where he is not named as a defendant he may, with the consent of all the parties to the suit,<sup>4</sup> but not otherwise,<sup>5</sup> appear at the hearing, and the objection of want of consent cannot be first taken on appeal.<sup>6</sup>

§ 213. **What constitutes an appearance.**— At common law a judgment or decree could not be taken without formal appearance by the defendant, or entry of appearance for him by the plaintiff in cases where such entry was allowable.<sup>7</sup> What constituted such formal entry was at one time often a matter of grave consideration. In chancery it consisted in filing in the proper clerk's office a written request to enter appearance and give notice to the opposite party.<sup>8</sup> But, at present, the formal entry has throughout the United States ceased to be important, because service on a defendant to appear is made equivalent to actual appearance.<sup>9</sup> Doubtless an entry of the solicitor's name, either by himself or the clerk at his instance, on the rule or trial docket would be sufficient;<sup>10</sup>

<sup>1</sup> *Hohorst v. Hamburg-American Packet Co.*, 88 Fed. Rep. 278. It has been held that a recital of an appearance is never conclusive, and when the expression is general it is confined to those parties who have been served with process. *Chester v. Miller*, 18 Cal. 558; *Hirschfield v. Franklin*, 17 Cal. 606.

<sup>2</sup> *Kentucky S. M. Co. v. Day*, 2 Sawy. 468.

<sup>3</sup> *Attorney-General v. Pearson*, 7 Sim. 290, 302.

<sup>4</sup> *Anderson v. Watt*, 188 U. S. 694.

<sup>5</sup> *Attorney-General v. Pearson*, 7 Sim. 302; *Kentucky S. M. Co. v. Day*, 2 Sawy. 468.

<sup>6</sup> *Anderson v. Watt*, 188 U. S. 694.

<sup>7</sup> 1 Tidd Pr. 288; 1 Daniell's Ch. Pr. (5th ed.) 537.

<sup>8</sup> 1 Tidd Pr. 288; 1 Daniell's Ch. Pr. (5th ed.) 537; 1 Hoffman's Ch. Pr. 170; *Livingston v. Gibbons*, 4 Johns. Ch. 94.

<sup>9</sup> *Sweeny v. Coffin*, 1 Dill. 75; *Fowlkes v. Webber*, 8 Humph. (Tenn.) 530.

<sup>10</sup> *Pugsley v. Freedman's S. & T. Co.*, 2 Tenn. Ch. 130, 138. See, also, *Romaine v. Union Ins. Co.*, 28 Fed. Rep. 625, 637, where it was said that appearances are rarely formally entered as such, notwithstanding Equity Rule 17, providing that "the appearance of the defendant either personally or by his solicitor shall be

and an entry upon the records of the court by filing a pleading duly signed constituting a part of the record, or formally in person or by attorney making an application or motion, would be an appearance.<sup>1</sup> Accordingly it was held by Chancellor Kent that where the defendant puts in an answer which is read in court by consent of the opposite counsel and ordered to be filed and a decretal order is made thereon, it is an appearance on the records.<sup>2</sup> A demurrer to a bill signed by the attorney-general of a State was held to be a sufficient appearance by such State in a suit brought against it;<sup>3</sup> and the filing of a petition for removal is an appearance within the act of congress providing for the removal of causes.<sup>4</sup> *A fortiori* will an answer or agreement, or both, signed by counsel, filed and used as a defense upon a motion, application or hearing, be held an appearance.<sup>5</sup>

§ 214. Appearance gratis.— A defendant may appear and make all appropriate defenses before service of subpoena upon him,<sup>6</sup> and such an appearance is termed an appearance *gratis*.<sup>7</sup> A defendant, upon being arrested on a *ne exeat*, may immediately enter his appearance and demand a copy of the bill, without waiting for the service of a subpoena.<sup>8</sup> An appear-

entered in the order-book on the day thereof by the clerk." Notice by the defendant's solicitor of an appearance given to the plaintiff's solicitor would probably bind the defendant. *Livingston v. Gibbons*, 4 Johns. Ch. 94.

<sup>1</sup> *Pugsley v. Freedman's S. & T. Co.*, 2 Tenn. Ch. 180; *Hinde's Pr.* 144; 1 Harr. Pr. 219, cited by Chancellor Kent in *Livingston v. Gibbons*, 4 Johns. Ch. 99; *Simmons v. Baynard*, 80 Fed. Rep. 582.

<sup>2</sup> *Livingston v. Gibbons*, 4 Johns. Ch. 99.

<sup>3</sup> *New Jersey v. New York*, 6 Peters, 828.

<sup>4</sup> *Sweeny v. Coffin*, 1 Dill. 75. See, also, *Desty's Removal of Causes* (3d ed.), § 1054, pp. 885, 886.

<sup>5</sup> *Pugsley v. Freedman's S. & T. Co.*,

2 Tenn. Ch. 180, 189; *Proudfit v. Pickett*, 7 Cold. (Tenn.) 563.

<sup>6</sup> Or upon other defendants. *Jones v. Fulghum*, 3 Tenn. Ch. 198.

<sup>7</sup> *Jones v. Fulghum*, 3 Tenn. Ch. 198; *Squibb v. McFarland*, 11 Heisk. (Tenn.) 563, 567. In *Fell v. Christ College*, 2 Bro. C. C. 279, Lord Thurlow said: — "I have no notion that a party made a defendant to a bill of complaint in this court may not appear *gratis* and get rid of the suit as soon as he can." See, also, *Bowhee v. Griggs*, 1 Dick. 38; *Barkley v. Lord Reay*, 2 Hare, 809; *Waffle v. Vanderheyden*, 8 Paige, 45; *Dunn v. Dunn*, 4 Paige, 425; *Seebor v. Hess*, 5 Paige, 85.

<sup>8</sup> *Georgia Lumber Co. v. Bissell*, 9 Paige, 225.

ance *gratis* does not deprive the complainant of his right to move for an injunction *ex parte*. Otherwise, as Lord Chancellor Eldon said, if a person about to commit waste, and against whom a bill had been filed, could by appearing the evening before the motion prevent it, he would get two days for cutting the timber.<sup>1</sup> But if the defendant appears after service of subpoena, he is entitled to notice of any application made against him.<sup>2</sup> Until an appearance the court will not authorize any proceeding by which he may be prejudiced; as, for instance, a special injunction, unless there are very cogent reasons to justify the immediate interference; and a service of notice of motion before appearance, without the special leave of the court, is irregular.<sup>3</sup> In the case of an injunction, the cause is in fact pending in the court from the time the chancellor makes the order for issuing the injunction. And though the defendant is not *bound* to appear before service and answer to it, still he is at liberty to do so, and it would not be permissible for the complainant to object. For improper delay in the service the defendant may appear and move for the dissolution or discharge of the injunction, or for service; or in term time may have the cause entered on the docket, and it would then stand for all proper proceedings the same as if the bill and injunction had been formally served.<sup>4</sup> Upon an appearance *gratis* the time within which the defendant must answer is to be calculated from the date of his actual appearance and not from that at which the subpoena would have been served if he had waited until the regular service.<sup>5</sup> An appearance *gratis* does not deprive the defendant of costs upon the allowance of his plea.<sup>6</sup>

§ 215. When an appearance must be made.—The United States Equity Rules provide that “the appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance-day shall be the next rule-day succeeding the rule-day when the

<sup>1</sup> Allard v. Jones, 15 Ves. 605; Perry v. Weller, 8 Russ. 519.

<sup>2</sup> Perry v. Wheeler, 8 Russ. 519.

<sup>3</sup> Hill v. Rimell, 2 My. & Cr. 641.

<sup>4</sup> Howe v. Willard, 40 Vt. 654.

<sup>5</sup> Webster v. Threlfall, 1 Sim. & Stu. 185.

<sup>6</sup> Bowhee v. Grills, 1 Dick. 88.

process is returnable.”<sup>1</sup> A defendant may enter his appearance before the day at which the writ is returnable and file an answer before the next succeeding rule-day.<sup>2</sup> It is error to render a final decree for want of appearance at the first term after service of subpoena unless another rule-day has intervened.<sup>3</sup> A non-resident defendant is entitled to the whole of the time which is fixed by statute wherein to appear, notwithstanding a copy of the order for his appearance be personally served upon him pursuant to the statute.<sup>4</sup>

**§ 216. Effect of appearance by guardian ad litem.**— Although if a party who is *sui juris* voluntarily appear and file his answer to a bill, it will be a waiver of the service of process, and he will be held to be a party, yet such a result does not follow where the answer of infants is filed by a guardian *ad litem*.<sup>5</sup>

**§ 217. Effect of unauthorized appearance.**— The entry of an appearance for a defendant carries with it a presumption that it was entered by his authority. If the contrary be alleged, affirmative proof must be produced, and until it is the defendant will be treated as properly in court.<sup>6</sup> It was formerly held that a defendant was concluded by an appearance entered for him without his authority, and that the only redress he could obtain for such a wrong was by an action

<sup>1</sup> Equity Rule 17. Equity Rule 2 provides that the first Monday of every month shall be a rule-day.

<sup>2</sup> Heyman v. Uhlman, 84 Fed. Rep. 686.

<sup>3</sup> O'Hara v. McConnell, 93 U. S. (1876), 150. See Equity Rules 18, 19.

<sup>4</sup> Cornell v. Watson, 1 Edw. Ch. 82.

<sup>5</sup> Frazier v. Rankey, 1 Swan (Tenn.), 75, 78; Taylor v. Walker, 1 Heisk. (Tenn.) 784. See, also, Irons v. Crist, 3 A. K. Marsh. 143; Bradwell v. Weeks, 1 Johns. Ch. 325. It was held in Wallace v. Hannum, 9 Humph. (Tenn.) 129, that a guardian *ad litem* might, for the benefit of the heirs, waive the service of a copy of a declaration in ejectment on himself; but that he could not submit the cause to arbitration. The

court said:—“He is to defend the suit in the court from which he derives his authority, according to the rules and principles of law applicable to the case, as admitted in that tribunal, and in conformity with the ordinary mode of trial and practice of the court in similar cases. It is not within the scope of his authority, or duty, to consent to change the tribunal for trial, or that the decision shall be upon principles other than those applicable to like cases in the forum in which the suit is pending. This special and restricted power admits of the exercise of no such discretion.”

<sup>6</sup> Dey v. Hathaway Printing & Co., 41 N. J. Eq. 419.



against the person who had fraudulently assumed to act for him. The modern rule is firmly settled the other way, and may be stated thus:—The entry of an appearance for a defendant carries with it a presumption that it was entered by authority. If the contrary be alleged, affirmative proof must be produced, and until it is the appearance will be held to be valid; but on its being satisfactorily proved, promptly after the discovery of the fact, that it was entered without authority, the defendant will be relieved from its consequences.<sup>1</sup> A judgment against a defendant who was never served with process, upon an unauthorized appearance by an attorney, may be enjoined though such defendant does not show that he has any defense to the claim sued on.<sup>2</sup> But an unauthorized appearance is not sufficient ground for vacating a decree against a party who was a non-resident and was served with notice by publication and mail in the manner prescribed by statute.<sup>3</sup>

**§ 218. General and special appearance.**—An appearance by motion to continue the cause to the next term is a general appearance.<sup>4</sup> A defendant demurred to the bill for want of jurisdiction acquired by the service of the subpoena and for want of equity. It was held too late to avail himself of the former objection.<sup>5</sup> Under a rule declaring that service of notice of an appearance or retainer generally by an attorney of

<sup>1</sup> *Mutual L. Ins. Co. v. Pinner* (1887), 43 N. J. Eq. 52, 56; *Dey v. Hathaway Printing &c. Co.*, 41 N. J. Eq. 419. In *Armstrong v. Craig*, 18 Barb. 387, it was said that if an attorney appears and acts without authority and is responsible, the court will not usually interfere if the opposite party has acquired rights, but will leave the party to his remedy against him.

<sup>2</sup> *Mills v. Scott*, 43 Fed. Rep. 452.

<sup>3</sup> *Mutual L. Ins. Co. v. Pinner*, 43 N. J. Eq. 52.

<sup>4</sup> *Straus v. Weil*, 5 Cold. (Tenn.) 120, 125. See, also, *Jones v. Andrews*, 10 Wall. 327. Whether the filing of a petition for the removal of a cause

from a State to a federal court constitutes a general appearance is not settled. See *Friedlands v. Pollock*, 5 Cold. (Tenn.) 490; *Parrott v. Alabama Gold Life Ins. Co.*, 5 Fed. Rep. 391; *Atchison v. Morris*, 11 Fed. Rep. 582; *Miner v. Markham*, 28 Fed. Rep. 387; *Small v. Montgomery*, 17 Fed. Rep. 865.

<sup>5</sup> *Hale v. Continental Ins. Co.*, 12 Fed. Rep. 359, where Wheeler, D. J., said:—“As the defendant appeared and demurred the parties are before the court, and there can be no question remaining upon the demurrer except as to the equity of the bill.” See, also, *King v. Stafford*, 5 How. Pr. 80.

the defendant shall in all cases be deemed an appearance, a notice of a special retainer for the purpose of moving to set aside the plaintiff's proceedings is not a general appearance in the action.<sup>1</sup> If a defendant wishes to challenge the sufficiency of the service by which it is attempted to obtain jurisdiction over him, he can do so by a special appearance for that purpose alone without leave of court.<sup>2</sup> But he cannot come in under a special appearance for the purpose of contesting a portion of the complainant's case without submitting himself to the jurisdiction of the court as to any other matter.<sup>3</sup>

**§ 219. Extending time for appearance.**—“Every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering, . . . and it is not only in the power of the court, but it is its duty, to exercise a sound discretion upon this subject, and to enlarge the time whenever it shall appear that the purposes of justice require it.”<sup>4</sup>

**§ 220. Appearance by married women.**—Where a bill is filed against husband and wife, the husband is bound to enter a joint appearance and put in a joint answer for both.<sup>5</sup> Where a bill against husband and wife was taken as confessed against him and the wife then appeared in the cause and answered, the court said it was irregular for the wife to appear in the cause except with her husband.<sup>6</sup>

<sup>1</sup> Webb v. Mott, 6 How. Pr. 440.

<sup>2</sup> National Furnace Co. v. Moline Malleable Iron Works, 18 Fed. Rep. 863. But see Romaine v. Union Ins. Co., 28 Fed. Rep. 625, 637.

<sup>3</sup> National Furnace Co. v. Moline Malleable Iron Works, 18 Fed. Rep. 863, denying a motion to enter such an appearance.

<sup>4</sup> Poultney v. City of La Fayette, 12 Peters, 472. “The rules prescribed by this court,” continued Taney, C. J., “do not and were not intended to deprive the courts of the United States of this well-known and necessary power.” The application in the

case cited was made upon affidavit of the facts, and the court laid a rule on the complainants to show cause why the defendants should not be allowed to the next term to make their appearance and defense, and that in the meantime no further proceeding should be had in the case.

<sup>5</sup> Leavitt v. Cruger, 1 Paige, 421. A decree against a woman whom the bill shows to be both a minor and a *feme covert*, with no appearance by her or for her, without appointing a guardian *ad litem*, is erroneous. O'Hara v. McConnell, 93 U. S. 150.

<sup>6</sup> But the defendant waived the ir-

**§ 221. Mode of entering special appearance.**— It was said by Hammond, J., in a case before him in the United States circuit court, that if a special appearance is desired it seems to be accomplished by some mere statement of counsel that he so appears, or it is left to mere implication from the step that he takes; and wherever the fact appears that he so limits his appearance, no matter how, no courts are more liberal than the federal courts in giving effect to that intention, without regard to any technical requirement of the practice in that behalf.<sup>1</sup> Where a subpoena was served outside of the judicial district, but the case was one in which the court would have jurisdiction to proceed upon a voluntary appearance, such service was deemed to be a mere irregularity, and that the correct course for the defendant was to move to enter a conditional appearance, so called because it is accompanied by, or the order granting leave to appear for the purpose of setting aside the service should contain, an undertaking or stipulation that the defendant shall submit without further process to the orders of the court if the point should be decided against him.<sup>2</sup>

**§ 222. Effect of an appearance.**— The right of the defendant to insist upon an objection to the illegality of the service is not waived by a special appearance to move the dismissal of the action on that ground or to set aside the service; nor when that motion is overruled by answering to the merits; and the objection may still be taken in the appellate court.<sup>3</sup> An appearance after judgment by default and making an unsuccessful motion to set it aside is not a waiver of the objec-

regularity by accepting her appearance and putting her under an order to answer. *Toole v. De Kay*, 4 Sandf. Ch. 385, 387. The court may, upon application by motion or petition where the wife refuses to join with the husband, or the latter is abroad and not amenable to process of the court, enter an order that she appear and answer separately. 1 Barb. Ch. Pr. (2d ed.) 82.

<sup>1</sup> *Romaine v. Union Ins. Co.*, 28 Fed. Rep. 625, where the authorities are examined.

<sup>2</sup> *Romaine v. Union Ins. Co.*, 28 Fed. Rep. 625. See *Dorr v. Gibboney*, 3 Hughes, 382; *Thayer v. Wales*, 5 Fisher's Pat. Cas. 448; *National Furnace Co. v. Moline Malleable Iron Works*, 18 Fed. Rep. 868.

<sup>3</sup> *Harkness v. Hyde*, 98 U. S. 476. "It is only where he pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived." s. c., p. 479, per Justice Field. See, also, *Halstead v. Manning*, 84 Fed. Rep. 565.

tion that summons was issued before filing the complaint.<sup>1</sup> An appearance subsequent to a decree and asking leave to make a motion to strike the case from the docket on the ground that no process was served does not impart validity to the decree if it is otherwise void.<sup>2</sup> It was held in New York that where a bill was filed against a person not residing within the circuit of a vice-chancellor, and the residence elsewhere appeared on the face of the bill, his voluntary appearance by a solicitor did not give jurisdiction, and his allowing the bill to be taken as confessed did not bind him. "The residence within the circuit was a jurisdictional fact," said the court, "which must exist before the court can act at all, either by issuing processes or accepting the appearance of a defendant. It is necessary to give jurisdiction of the cause, not of the person. In such case there can be no waiver. The want of jurisdiction appears on the record."<sup>3</sup> Although an appearance by a defendant who was not found within the district, and was not served, is such a waiver as to give the court jurisdiction to proceed to judgment against him, it does not preclude him from contesting the validity of attachment proceedings prior to the appearance, and *a fortiori* it does not affect the rights of a garnishee, either by compelling the latter to appear and make disclosure under the writ of garnishment or to assert their title or possession to the property.<sup>4</sup> And the putting in issue the ground of an attachment by proper plea or an application to remove the cause to a federal court is not such an appearance as will subject the defendant against his consent to a judgment upon the cause of action against him *in personam*.<sup>5</sup> An appearance *gratis* by one who

<sup>1</sup> Mills v. State, 10 Ind. 114.

<sup>2</sup> Dorr v. Gibboney, 8 Hughes, 882.

<sup>3</sup> Burckle v. Eckhardt, 8 Comst. 182. See, also, State v. Whitewater Valley Canal Co., 8 Ind. 320; Romaine v. Union Ins. Co., 28 Fed. Rep. 625. Where a defendant appears specially to plead to the jurisdiction of the court it will not operate as an appearance for the purposes of jurisdiction over him. United States v. American Bell Tel. Co., 29 Fed. Rep. 17; Van Antwerp v. Hulburd, 7

Blatchf. 428. Since a judgment for costs in a suit for partition is *in personam*, where the appearance in the action of non-resident defendants was by attorneys appointed therefor by the court, a sale of land on execution of such judgment is void. Foote v. Sewall (Tex. Sup.), 17 S. W. Rep. 373.

<sup>4</sup> Noyes v. Canada, 80 Fed. Rep. 665.

<sup>5</sup> Freidlander v. Pollock, 5 Cold. (Tenn.) 490; Sherry v. Divine, 11 Heisk. (Tenn.) 722; Boon v. Rahl, 1

is not named in the bill does not cure the defect;<sup>1</sup> for no one is a party unless named in the bill.<sup>2</sup>

§ 223. The same subject continued.—The rule is that where a defendant appears *solely* for the purpose of objecting, by motion, to the jurisdiction of the court over the person, such motion is not a voluntary appearance which is equivalent to service.<sup>3</sup> Where, however, the motion involves the merits of the case made by the bill the rule is otherwise.<sup>4</sup> Thus where a defendant appears and moves to dismiss for want of jurisdiction and also for want of equity,<sup>5</sup> or if he sets up the same defense in an answer,<sup>6</sup> or perhaps by demurrer,<sup>7</sup> it is a waiver of the objection that he was not sued in the proper district.<sup>8</sup> Where a party is ordered to appear but no process is served upon him, and he voluntarily appears and files an answer, it is too late for him to object that there was error in the order.<sup>9</sup> A general appearance waives the omission of the defendant's name in the prayer for process.<sup>10</sup> By appearing and putting in an answer the defendant waives any objection to the regularity of service of the subpoena.<sup>11</sup> Notice of a writ of error is waived by appearance and moving to dismiss for want of notice.<sup>12</sup> An appearance upon appeal is a waiver of citation, and once entered it cannot be withdrawn so as to defeat the appeal for want of a citation.<sup>13</sup>

Heisk. (Tenn.) 12. See, also, Merrill v. Houghton, 51 N. H. 61.

<sup>1</sup> Kentucky S. M. Co. v. Day, 2 Sawy. 468, 478. In an action in the United States courts against a State, if the State neglects or refuses to appear, upon due service of process, no coercive measures will be taken to compel an appearance, but the plaintiff will be allowed to proceed *ex parte*. New Jersey v. New York, 5 Peters, 284; Massachusetts v. Rhode Island, 12 Peters, 755.

<sup>2</sup> § 166, note 5, *supra*.

<sup>3</sup> Elliott v. Lawhead, 43 Ohio St. 171.

<sup>4</sup> Elliott v. Lawhead, 43 Ohio St. 171; Handy v. Insurance Co., 87 Ohio St. 866; Maholm v. Marshall, 29 Ohio St. 611.

<sup>5</sup> Jones v. Andrews, 10 Wall. 827.

<sup>6</sup> Blackburn v. Selma &c. R. Co., 2 Flippin, 525.

<sup>7</sup> Blackburn v. Selma &c. R. Co., 2 Flippin, 525, 533.

<sup>8</sup> See § 38, *supra*; Agee v. Dement, 1 Humph. (Tenn.) 332; Ferris v. Fort, 2 Tenn. Ch. 147, 150.

<sup>9</sup> Henderson v. Carbondale Coal & Coke Co., 140 U. S. 26.

<sup>10</sup> Buerk v. Imhaeuser, 8 Fed. Rep. 457; Segee v. Thomas, 3 Blatchf. 11.

<sup>11</sup> Goodyear v. Chaffee, 3 Blatchf. 268; Payne v. Farmers' & Citizens' Bank, 29 Conn. 416.

<sup>12</sup> McBee v. McBee, 1 Heisk. (Tenn.) 558.

<sup>13</sup> United States v. Yates, 6 How. 606.

## CHAPTER VIII.

### DEMURRERS.

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| <p>§ 224. Definition of a demurrer.</p> <p>225. Nature and office of a demurrer.</p> <p>226. Speaking demurrers.</p> <p>227. Demurrers to answers.</p> <p>228. Admissions by a demurrer.</p> <p>229. The same subject continued — Construction of written instruments.</p> <p>230. Admissions available for what purpose.</p> <p>231. General and special demurrers.</p> <p>232. When a defendant should demur.</p> <p>233. Classification of demurrers to relief.</p> <p>234. The same subject continued — Demurrers to substance.</p> <p>235. Classification of demurrers to form.</p> <p>236. Classification of demurrers to discovery.</p> <p>237. Demurrers to bills for relief and discovery.</p> <p>238. What objections are reached by general demurrer.</p> <p>239. What objections are not covered by general demurrer.</p> <p>240. The same subject continued.</p> <p>241. Demurrer to part of a bill — Plea or answer overruling demurrer.</p> <p>242. The same subject continued — United States Equity Rules.</p> <p>243. Specification of extent of demurrer.</p> <p>244. Incorporating demurrer in answer.</p> | <p>§ 245. General demurrer — Specification of grounds — Statutes and rules of court.</p> <p>246. The same subject continued.</p> <p>247. Demurrers bad in part.</p> <p>248. Demurrer for want of jurisdiction.</p> <p>249. The same subject continued.</p> <p>250. Demurrer for incapacity to sue.</p> <p>251. The same subject continued.</p> <p>252. Demurrer for want of parties.</p> <p>253. The same subject continued — Effect of sustaining demurrer.</p> <p>254. Demurrer for misjoinder of parties.</p> <p>255. Formal requisites of demurrer for want of parties.</p> <p>256. Demurrer for defect of parties.</p> <p>257. Statute of limitations as a ground of demurrer.</p> <p>258. Demurrer for laches.</p> <p>259. The same subject continued.</p> <p>260. The statute of frauds as a ground of demurrer.</p> <p>261. Demurrers for want of title in complainant.</p> <p>262. Demurrer for multifariousness.</p> <p>263. Demurrers to amended bills.</p> <p>264. Demurrer <i>ore tenus</i>.</p> <p>265. The same subject continued — Costs.</p> <p>266. Filing a demurrer.</p> <p>267. Title of a demurrer.</p> <p>268. Protestation clause.</p> <p>269. Signature to a demurrer.</p> <p>270. Certificate of counsel.</p> |
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- § 271. Prayer of judgment.
- 272. Demurrer on extension of time to answer.
- 273. Motions to take demurrers off the file.
- 274. Setting demurrers down for argument.
- 275. Effect of judgment on demurrer.

- § 276. Overruling a demurrer.
- 277. The same subject continued.
- 278. Overruling a demurrer upon appeal.
- 279. Sustaining a demurrer — Leave to amend.
- 280. The same subject continued.

§ 224. Definition of a demurrer.— A demurrer has been so termed because the party demurring *demoratur*, or will go no further,<sup>1</sup> the other party not having shown sufficient matter against him; and it is in substance an allegation by a defendant, which, admitting the matters of fact stated by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer, or that for some reason apparent on the face of the bill, or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the plaintiff ought not to be allowed to proceed. It therefore demands judgment of the court whether the defendant shall be compelled to make any further or other answer to the plaintiff's bill or that particular part of it to which the demurrer applies.<sup>2</sup>

§ 225. Nature and office of a demurrer.— A demurrer must be founded on some dry point of law which goes to the absolute denial of the relief sought.<sup>3</sup> As the appointment of a receiver rests in the sound discretion of the court, it forms no ground of demurrer to a bill praying for the appointment.<sup>4</sup>

<sup>1</sup> 3 Blackstone's Com. 314. A demurrer in equity is borrowed from the common law. There was no demurrer in the civil law, nor in the ecclesiastical courts. *Hays v. Heatherly* (West Va.), 15 S. E. Rep. 223, 225, 226.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 543. The only pleading that can be demurred to is the bill, which, of course, includes a cross-bill. The ground of demurring to the bill in equity is the same as for demurring to a declara-

tion at law, namely, that upon the facts of the bill, and assuming everything stated in it to be true, the plaintiff is not entitled to any relief. Langdell's Equity Pleading, § 94 et seq.; *Hays v. Heatherly* (West Va.), 12 S. E. Rep. 223.

<sup>3</sup> *Verplank v. Caines*, 1 Johns. Ch. 57; *Gibson's Suits in Chancery*, § 284; *Roberdean v. Rous*, 1 Atk. 544; *Brien v. Buttorff*, 2 Tenn. Ch. 523.

<sup>4</sup> *Verplank v. Caines*, 1 Johns. Ch. 57.



A demurrer must be founded upon an absolute, certain and clear proposition that, taking the charges in the bill to be true, the bill would be dismissed at the hearing.<sup>1</sup> A demurrer will not hold to an irregularity of practice in regard to the bringing or filing of a bill; as, for instance, that it had not been served.<sup>2</sup> A clause in a bill which does not show any independent right to equitable relief, nor strengthen the right to relief under the other averments of the bill, and is mere surplusage, cannot be reached by demurrer, but by exceptions to the bill.<sup>4</sup> So an irregularity in filing a supplemental bill and an amendment to the original bill without leave of court cannot be taken advantage of by demurrer, but a motion should be made to strike it from the files.<sup>5</sup>

§ 226. **Speaking demurrers.**— A speaking demurrer is one which introduces some new fact or averment which is neces-

<sup>1</sup> *Brook v. Hewitt*, 8 Ves. 225; 1 Daniell's Ch. Pr. 548; *Atterson v. Mair*, 2 Ves. Jr. 95; s. c., 4 Bro. C. C. 270; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 688. But see *Story's Equity Pleading* (10th ed.), § 456, note 8. Where a bill to compel the defendant to transfer the title to land alleges an equitable title in the complainant and simply admits that the defendant holds the legal title, and does not allege that the defendant is a *bona fide* purchaser, on demurrer the court cannot consider the equities of the defendant as a purchaser without notice. Those equities, if he has any, must be shown to the court by answer fully and clearly, so that if they be proved on the trial they will defeat the complainant's claim. *Weeks v. Milwaukee &c. Ry. Co.* (Wis.), 47 N. W. Rep. 787. Where a cross-bill sets up facts which show nothing more than a defense, and which if proved would afford no affirmative relief, it is obnoxious to a demurrer. *Wing v. Goodman*, 75 Ill. 159; *Carter v. Harvey* (Miss.), 7 So. Rep. 286.

<sup>2</sup> *Tallmadge v. Lovett*, 8 Edw. Ch. 568.

<sup>3</sup> *Livingston v. Marshall* (Ga.), 11 S. E. Rep. 542. Where a bill contains an averment in opposition to facts of which the court will take judicial notice, such averment in arguing a demurrer is considered as a nullity. 1 Daniell's Ch. Pr. (5th ed.) 546.

<sup>4</sup> *Stirrat v. Excelsior Mfg. Co.*, 44 Fed. Rep. 142.

<sup>5</sup> *Orvis v. Cole*, 14 Ill. App. 288. The objection that a claim for rolling stock of a railroad in the hands of a receiver, made by an intervenor, was barred because not presented within the time limited by an order theretofore made in the cause, should be raised by plea, and not by demurrer. *Central Trust Co. v. Wabash &c. Ry. Co.*, 46 Fed. Rep. 156. A demurrer will not lie because an indispensable party has not been served with subpoena to appear and answer where there is a prayer for process against him. "As he may be brought in by service or may enter a voluntary appearance, it would be premature to

sary to support the demurrer and which does not distinctly appear upon the face of the bill. Such a demurrer will be overruled.<sup>1</sup> A demurrer which the pleader attempts to sustain by an averment of fact in a plea or answer is in the nature of a speaking demurrer and is not aided by such an averment.<sup>2</sup> It seems that if a bill alleges that a person has become a bankrupt, but does not allege that assignees have been chosen, a demurrer to the bill on the ground that the assignees are not parties to the suit is a speaking demurrer and therefore bad.<sup>3</sup> But a demurrer for that it appears on the bill that the agreement therein alleged to have been entered into is not in writing signed by the defendant is not a speaking demurrer. It raises no issue of fact, but merely states what appears by the bill.<sup>4</sup> In order to constitute a speaking demurrer the fact or averment introduced must be one which is necessary to support the demurrer; the introduction of immaterial facts or averments, or of arguments, is improper; but it is mere surplusage and will not vitiate the demurrer.<sup>5</sup>

§ 227. Demurrers to answers.—In equity a demurrer is only a mode of defense to the bill. It is never properly resorted to for the purpose of determining the validity of a plea or an answer.<sup>6</sup> The mode in which a plaintiff avails himself

sustain a demurrer to the bill because he is not already served." *Kilgour v. New Orleans Gas Light Co.*, 2 Woods, 144.

<sup>1</sup> *Brooks v. Gibbons*, 4 Paige, 874; *Story's Equity Pleading* (10th ed.), § 448; *Davies v. Williams*, 1 Sim. 5; *Bronsword v. Edwards*, 2 Ves. 245; *Henderson v. Cook*, 4 Drew. 806; *Saxon v. Barksdale*, 4 Desaus. 522; *Black v. Shreeve*, 7 N. J. Eq. 441. A speaking demurrer is where by way of argument or inference a demurrer suggests a material fact which is not alleged in the bill. *Cawthorn v. Chalie*, 2 Sim. & Stu. 127, 129. It is no part of the province of a demurrer to bring forward any issue of fact. *Wood v. Midgley*, 5 De G., M. & G. 41.

<sup>2</sup> *Kuypers v. Reformed Dutch*

*Church*, 6 Paige, 570; *Stewart v. Masterson*, 181 U. S. 151; *Chicago &c. R. Co. v. Macomb*, 2 Fed. Rep. 18. The court will not draw inferences of fact to sustain a demurrer if there are sufficient express averments to support the bill. *Warfield v. Fisk*, 186 Mass. 219.

<sup>3</sup> *Pendlebury v. Walker*, 4 Y. & Col. 424.

<sup>4</sup> *Wood v. Midgley*, 5 De G., M. & G. 41.

<sup>5</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 588.

<sup>6</sup> *Barton's Suits in Equity*, 96; *Mitford's Pl.*, by *Jeremy*. 107; *Cooper's Eq. Pl.* 110; *Story's Equity Pleading*, 9; *Lube's Pl.* 46, 815, 855; *Hinde's Pr.* 146; *Blake's Pr.* 107; 1 *Daniell's Ch. Pr.* 598; 4 *Bouvier's Inst.*, sec. 4215; *Raymond v. Simonson*, 7

of defects in the answer is by exception, or by setting down the cause for hearing upon bill and answer.<sup>1</sup> In Massachusetts, where there was a demurrer to an answer and the case was argued upon the merits before the full court upon the pleadings and report, the court disregarded the irregularity;<sup>2</sup> but under similar conditions the Supreme Court of Florida declined to recognize the pleading.<sup>3</sup>

**§ 228. Admissions by a demurrer.**—A demurrer admits the truth of all the facts in the bill which are well pleaded.<sup>4</sup> Thus where a bill to set aside a deed of land sold for taxes alleges that no such notice as the statute requires was given before taking out the tax deed, a demurrer admits that fact.<sup>5</sup> But it admits such facts only as are positively charged, and as to matters charged upon information and belief it admits only that the complainant is so informed and does so believe.<sup>6</sup> It does not admit that the complainant was induced to surrender a writing on which his rights depend upon an averment that he was induced, without any averment of facts showing the use of improper means.<sup>7</sup> Mere averments of a

Blackf. (Ind.) 79; *Travers v. Ross*, 14 N. J. Eq. 254, 258; *Crouch v. Kerr*, 28 Fed. Rep. 549, where the demurrer was stricken out; *Banks v. Manchester*, 128 U. S. 250.

<sup>1</sup> *Barry v. Abbot*, 100 Mass. 896, 898; *Brown v. Scottish Amer. Mort. Co.*, 110 Ill. 235; *Stone v. Moore*, 26 Ill. 165; ch. XI, *infra*.

<sup>2</sup> *Barry v. Abbot*, 100 Mass. 896.

<sup>3</sup> "No such pleading as a demurrer to an answer in chancery is known to the practice in this State. After answer the next step is to except for insufficiency or impertinence, to set the cause down for hearing upon bill and answer, or to file a replication. While there was no objection by defendant to the filing of this demurrer by plaintiff, and while the defendant went to a hearing upon the demurrer without objection, still this court cannot sanction a totally unauthorized practice. We cannot de-

termine what is the legal effect of an unauthorized pleading, because the law gives it none, and the judgment based upon it can only be reversed." *Edwards v. Drake*, 15 Fla. 666.

<sup>4</sup> *Goble v. Andruss*, 2 N. J. Eq. 66; *Dillon v. Barnard*, 21 Wall. 480; *Holabird v. Burr*, 17 Conn. 556; *Redmond v. Dickerson*, 9 N. J. Eq. 507; *Pullman Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587; *Preston v. Smith*, 26 Fed. Rep. 884; *Union Pac. Ry. Co. v. Meier*, 28 Fed. Rep. 9; *Force v. Dutcher*, 17 N. J. Eq. 165; *Interstate Land Co. v. Maxwell Land Co.*, 139 U. S. 569.

<sup>5</sup> *Gage v. Bailey*, 115 Ill. 646.

<sup>6</sup> *Walton v. Westwood*, 73 Ill. 125. See, also, *Union Pac. Ry. Co. v. Meier*, 28 Fed. Rep. 9.

<sup>7</sup> *Stow v. Russell*, 36 Ill. 18. "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case

legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation.<sup>1</sup> Where a bill alleged as a fact that a check was paid, and then proceeded to detail the manner and circumstances of its payment, and the circumstances appealed to to show its payment did not establish the fact, it was held that the allegation amounted to nothing.<sup>2</sup> An averment in the bill that a certain transaction constituted a mortgage is but an inference of the pleader from the facts stated, and the correctness of that inference is not admitted by a demurrer.<sup>3</sup> The patentability of the thing patented is not admitted by a demurrer to a bill for infringement alleging that the patentee was the first inventor.<sup>4</sup>

**§ 229. The same subject continued—Construction of written instruments.**—A demurrer does not admit that the construction of a written instrument set forth in the bill is the true one, or that its legal effect is contrary to that which its language imports.<sup>5</sup> Where an inconsistency appears be-

for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification." *Ambler v. Choteau*, 107 U. S. 586, 591; *Fogg v. Blair*, 139 U. S. 118. But an averment that a thing was done with the intent to defraud is an allegation of fact and not a conclusion of law. *Platt v. Mead*, 9 Fed. Rep. 91.

<sup>1</sup> *Horsford v. Gudger*, 35 Fed. Rep. 388; *Preston v. Smith*, 26 Fed. Rep. 884; *Cornell v. Greed*, 43 Fed. Rep. 105; *Dillon v. Barnard*, 21 Wall. 430; *Wilson v. Gaines*, 103 U. S. 417; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Louisville & Nashville R. Co. v. Palmes*, 109 U. S. 244; *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Thompson v. Bank of Redemption*, 106 Mass. 128; *Stow v. Russell*, 36 Ill. 18; *Peasson v. Tower*, 55 N. H. 36; *Partee v. Kartrecht*, 54 Miss. 66.

The effect of what was done is a question of law, not of fact. *Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587.

<sup>2</sup> *Redmond v. Dickerson*, 9 N. J. Eq. 507.

<sup>3</sup> *Greig v. Russell*, 115 Ill. 484.

<sup>4</sup> *Kaolatype Engraving Co. v. Hoke*, 80 Fed. Rep. 444. Where the validity of a patent is doubtful, a demurrer to a bill for its infringement will be overruled and the question reserved for further consideration on final hearing. *Standard Oil Co. v. Southern Pac. Co.*, 42 Fed. Rep. 295. See, *Indurated Fibre Industries Co. v. Grace*, 52 Fed. Rep. 124.

<sup>5</sup> *Interstate Land Co. v. Maxwell Land Co.*, 139 U. S. 569; *Lea v. Robeson*, 12 Gray, 280; *Dillon v. Barnard*, 21 Wall. 430. The court will construe the instrument for the pleader. *North v. Kizer*, 72 Ill. 172. It does not admit "the correctness of the ascription of a purpose to the par-

tween an averment of a bill and a written instrument attached thereto as an exhibit the latter will prevail, and the demurrer does not admit the truth of the averment.<sup>1</sup> "Though the authorities are by no means unanimous, the weight of opinion is in favor of the proposition that where profert is made of a recorded paper it is for all purposes presented to the court as a part of the pleading, and an objection thereto may be taken by demurrer."<sup>2</sup>

**§ 230. Admissions available for what purpose.**—A demurrer is an admission of the truth of such matters in the bill as are well pleaded, but it is such an admission only for the purpose of obtaining the judgment of the court as to the sufficiency of the bill on its face to entitle the complainant to relief, or rather it is a pleading by which the defendant demands the judgment of the court whether he should be compelled to answer the bill or not. For no other purpose can it be held to be an admission of the allegations in the bill unless it appears that, the demurrer being held insufficient, the defendant elected to abide by it and permitted a decree to go against him upon the facts thus admitted.<sup>3</sup> A demurrer admits the allegations of the bill for the purposes of a motion on the bill and demurrer.<sup>4</sup>

**§ 231. General and special demurrers.**—A defendant is said to demur generally when he demurs to the jurisdiction

ties when not justified by the language used." *Dillon v. Barnard*, *supra*.

<sup>1</sup> *National Park Bank v. Halle*, 80 Ill. App. 17; *Greig v. Russell*, 115 Ill. 484; *North v. Kizer*, 72 Ill. 172.

<sup>2</sup> *Coxe, J.*, in *Bogart v. Hinds*, 25 Fed. Rep. 489. See, also, *Knott v. Burleson*, 2 G. Greene (Iowa), 600; *Rantin v. Robertson*, 2 Strobb. Law (S. C.), 866; *Wilder v. McCormick*, 2 Blatchf. 81, 85; *Grahame v. Cooke*, 1 Cranch, 116; *Douglass v. Rathbone*, 5 Hill, 148. But in a bill for infringement, the profert by complainants of the letters-patent does not make the recitals in the specifications as to the prior state of the art a part of the

bill in any technical or proper sense, so that the prior state of the art can be considered on demurrer. *Indurated Fibre Industries Co. v. Grace*, 52 Fed. Rep. 124, where the practice of demurring on the ground of want of invention was criticised and the authorities examined. See *West v. Rae*, 38 Fed. Rep. 45; *International & Co. v. Maurer*, 44 Fed. Rep. 618.

<sup>3</sup> *Kankakee & Co. R. Co. v. Horan*, 181 Ill. 288, where it was sought to use the demurrer as evidence of the truth of the allegations in the bill in another suit.

<sup>4</sup> *Bayerque v. Cohen*, *McAllister*, 118.

or to the substance of the bill, or specially when he demurs on the ground of a defect in form.<sup>1</sup> A general demurrer is one that assigns no particular or specific ground of objection to the bill except the usual formulary, "that there is no equity in the bill."<sup>2</sup> A special demurrer is one that points out the particular defects which it is intended to cover.<sup>3</sup> Where a demurrer points out a particular repugnancy in the allegations in a bill it does not, although directed to the whole bill, reach other allegations which are also clearly repugnant.<sup>4</sup>

**§ 232. When a defendant should demur.**—"That an objection to the equity of the plaintiff's claim, as stated in the bill, must be taken by demurrer and not by plea, is so well established that it has been constantly assumed and therefore seldom stated in judicial opinions."<sup>5</sup> When the bill shows that the complainant has no right to answer for any purpose, the proper course for the defendant is to demur instead of

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 586. A general demurrer will not be allowed when the bill presents a case in which the legitimate proof may be such as to call for a decree in favor of the complainant. *Drummond v. Westervelt*, 24 N. J. Eq. 80.

<sup>2</sup> Gibson's Suits in Chancery, § 307. It is not sufficient to say generally that the defendant demurs to the bill. 1 Daniell's Ch. Pr. (5th ed.) 586; *Duffield v. Graves*, Carey, 87; *Offeley v. Morgan*, Carey, 107; *Peachie v. Twycrosse*, Carey, 118. A demurrer to a bill for want of equity must be interposed at the outset of the proceedings, for, if the defendant submits to answer to the merits, he waives his demurrer. *McLane v. Johnson*, 59 Vt. 237; s. c., 9 Atl. Rep. 837. The distinction between general and special demurrers in the common-law sense never existed in equity. But by a general demurrer in equity is meant one which simply says there is no equity in the bill. But a demurrer must in strictness express the several causes of demurrer

(Mitford's Eq. Pl. 218); for one demurrer may be overruled upon argument and another allowed. Mitford's Eq. Pl. 215. See, also, Story's Equity Pleading (10th ed.), § 455. The formal statement of causes of demurrer though usual is not absolutely necessary. The assertion of a general demurrer is that the complainant on his own showing has not made out a case. If the causes of demurrer are not formally set forth the complainant may object and require them to be thus stated. *Taylor v. Holmes*, 14 Fed. Rep. 498, 501.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 455.

<sup>4</sup> *New England Mortg. Sec. Co. v. Powell* (Ala.), 12 So. Rep. 55.

<sup>5</sup> *Farley v. Kittson*, 120 U. S. 303, citing *Billing v. Flight*, 1 Madd. 280; *Steff v. Andrews*, 2 Madd. 6; *Varick v. Dodge*, 9 Paige, 149; *Phelps v. Garrow*, 3 Edw. Ch. 139; *Rhode Isl. and v. Massachusetts*, 14 Pet. 210, 258, 262; *National Bank v. Insurance Co.*, 104 U. S. 54, 76.

pleading a new fact in bar; for, upon the argument of a plea, either as to the discovery or the relief, the defendant cannot sustain his plea by showing that the bill itself would have been bad upon demurrer.<sup>1</sup> Where the complainant is clearly not entitled either to relief or discovery as against one of the defendants such defendant should demur. If he puts in an answer unnecessarily the court may refuse to allow him extra costs of such answer.<sup>2</sup> If a bill of revivor filed against the defendant shows no title to revive as against him the defendant should demur instead of pleading thereto.<sup>3</sup> Whether the executor of a deceased co-obligee should be joined with the surviving obligee in a bill for foreclosure, or be made a party defendant, is a question of form, and should be raised upon demurrer.<sup>4</sup> And, generally, technical objections to be available at any time can only be raised by demurrer.<sup>5</sup>

**§ 233. Classification of demurrers to relief.**—Demurrers to original bills for relief may be divided into three classes:<sup>6</sup>—(1) to the jurisdiction; (2) to the person of the plaintiff; and (3) to the matter of the bill, either as to its substance or as to its form and frame.<sup>7</sup> Demurrers to the jurisdiction admit of subordinate division, viz.:—(1) that the subject is not cognizable by any municipal court of justice;<sup>8</sup> (2) that the subject

<sup>1</sup> *Sperry v. Miller*, 2 Barb. Ch. 682.

<sup>2</sup> *Murray v. Graham*, 6 Paige, 622; *Harland v. Bankers' & M. Tel. Co.*, 82 Fed. Rep. 805.

<sup>3</sup> *Evertson v. Ogden*, 8 Paige, 275.

<sup>4</sup> *Freeman v. Scofield*, 16 N. J. Eq. 28.

<sup>5</sup> *McClosky v. McCormick*, 44 Ill. 886; *Fischer v. O'Shaughnessey*, 6 Fed. Rep. 92; *Crosse v. Redingfield*, 12 Simons, 85; *Hook v. Dorman*, 1 Sim. & Stu. 227; *Story's Equity Pleading* (10th ed.), §§ 458, 528. In Connecticut, under the Practice Act of 1879, all objections to the complaint should be taken advantage of by demurrer before a trial on the merits. If a complaint were improperly drawn for double relief, the point cannot be raised for the first time by

objecting to the evidence. *Trowbridge v. True*, 52 Conn. 190. A plea in abatement is not the proper mode of taking the objection by a *feme covert* to being sued alone. The objection may be taken by demurrer if the fact appear upon the face of the bill; otherwise by plea or answer. *Gardner v. Moore*, 2 Edw. Ch. 818.

<sup>6</sup> This division follows that of Judge Story, which in turn is founded upon that of Mr. Cooper. *Story's Equity Pleading* (10th ed.), 466, n. 1; *Cooper's Eq. Pl.* 118.

<sup>7</sup> *Story's Equity Pleading* (10th ed.), § 466.

<sup>8</sup> As, for instance, where the subject is entirely of a political character. *Story's Equity Pleading* (10th ed.), § 468. See § 20, *supra*.



is not within the jurisdiction of a court of equity;<sup>1</sup> (3) that some other court of equity is invested with the proper jurisdiction;<sup>2</sup> (4) that some other court possesses the proper jurisdiction.<sup>3</sup> Demurrers to the person are either (1) that the plaintiff is not entitled to sue by reason of some personal disability;<sup>4</sup> (2) that the plaintiff has no title to the character in which he sues.<sup>5</sup>

**§ 234. The same subject continued — Demurrers to substance.**— Demurrers to the substance of a bill are:<sup>6</sup> (1) that the plaintiff has no interest in the subject;<sup>7</sup> (2) that although the plaintiff has an interest, yet the defendant is not answerable to him, but to some other person;<sup>8</sup> (3) that the defendant has no interest;<sup>9</sup> (4) that the plaintiff is not entitled to the relief which he has prayed;<sup>10</sup> (5) that the value of the subject-matter is beneath the dignity of the court;<sup>11</sup> (6) that the bill does not embrace the whole matter;<sup>12</sup> (7) that there is a want of proper parties;<sup>13</sup> (8) that the bill is multifarious;<sup>14</sup> (9) that the plaintiff

<sup>1</sup> As to demurrer or other mode of objecting on account of adequate remedy at law, see §§ 18, 14, *supra*.

<sup>2</sup> "This is a case which can rarely occur in America, from the structure of our local equity tribunals." Story's Equity Pleading (10th ed.), § 486. See, however, Baptist Ass'n v. Hart, 4 Wheat. 1.

<sup>3</sup> It was held in South Carolina that the objection cannot be raised upon a demurrer on the ground that the bill does not state a cause of action. McKibben v. Salinas (S. C.), 15 S. E. Rep. 548. As to the limitation of the power of the federal courts depending upon citizenship of the parties, see chapter II, on JURISDICTION, *supra*.

<sup>4</sup> See §§ 250, 251, *infra*, and § 40 *et seq.*, *supra*.

<sup>5</sup> See §§ 250, 251, *infra*.

<sup>6</sup> The following division is taken from 1 Daniell's Ch. Pr. (5th ed.) 556.

<sup>7</sup> See § 261, *infra*, and § 105, *supra*;

Story's Equity Pleading (10th ed.), 509 *et seq.*

<sup>8</sup> See § 252, *infra*, and § 105, *supra*; Story's Equity Pleading (10th ed.), §§ 518, 520.

<sup>9</sup> See § 288, *infra*, and § 105, *supra*; Story's Equity Pleading (10th ed.), § 519.

<sup>10</sup> See §§ 288, 240, *infra*, and §§ 91, 92, 98, *supra*; Patrick v. Isenhardt, 20 Fed. Rep. 839. This may occur where the object of the bill is to enforce a penalty or a forfeiture. Story's Equity Pleading (10th ed.), § 521.

<sup>11</sup> See §§ 17, 18, 19, *supra*; 1 Daniell's Ch. Pr. (5th ed.) 558.

<sup>12</sup> 1 Daniell's Ch. Pr. (5th ed.), 559, 880. See, also, Story's Equity Pleading (10th ed.), §§ 287-290; Purefoy v. Purefoy, 1 Vern. 29; Shuttleworth v. Laycock, 1 Vern. 245; Margrave v. Le Hooke, 2 Vern. 207.

<sup>13</sup> See § 252 *et seq.*, *infra*, and ch. III, on PARTIES, *supra*.

<sup>14</sup> See § 262, *infra*, and § 115 *et seq.*, *supra*.

iff's remedy is barred by length of time;<sup>1</sup> (10) the statute of frauds;<sup>2</sup> (11) that it appears by the bill that there is another suit depending for the same matter.<sup>3</sup>

**§ 235. Classification of demurrers to form.**—The grounds upon which a bill may be demurred to by reason of a deficiency as to form are: (1) because the plaintiff's place of abode is not stated;<sup>4</sup> (2) because the facts essential to the plaintiff's right, and within his own knowledge, are not alleged positively;<sup>5</sup> (3) because the bill is deficient in certainty;<sup>6</sup> (4) because the plaintiff does not by his bill offer to do equity where the rules of the court require that he should do so;<sup>7</sup> or to waive penalties or forfeitures where the plaintiff is in a situation to make such waiver;<sup>8</sup> (5) the want of signature of counsel to the bill;<sup>9</sup> (6) the absence of the proper affidavit in

<sup>1</sup> See §§ 258, 259, *infra*, and § 106, *supra*.

<sup>2</sup> See § 260, *infra*.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 561. When a decree in a former suit (signed and enrolled) between the same parties for the same matter appears on the face of the bill the defendant may demur. *Davoue v. Fanning*, 4 Johns. Ch. 199. See, also, *Waine v. Crocker*, 10 W. R. 204; s. c., 3 De G., F. & J. 421; *Knight v. Atkisson*, 2 Tenn. Ch. 387. It cannot be objected by demurrer that an inventor had prosecuted an appeal from a former order made in regard to his claim where the fact of such appeal does not appear on the face of the petition. *Central Trust Co. v. Wabash &c. Ry. Co.*, 46 Fed. Rep. 156.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 562; *Rowley v. Eccles*, 1 Sim. & Stu. 511. See *Winnipiseogee Lake Co. v. Young*, 40 N. H. 42; *Howe v. Harvey*, 8 Paige, 73; *Gove v. Pettis*, 4 Sandf. Ch. 403. But the demurrer must be special. *McCoy v. Boley*, 21 Fla. 803, cited in § 239, n. 4, *infra*.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 562,

857; § 238, *infra*. The point can be raised only on demurrer. *Smith v. Kay*, 7 H. L. Cas. 750. Which, however, may be a general demurrer. 1 Daniell's Ch. Pr. (5th ed.) 587.

<sup>6</sup> *Goldsmith v. Gilliland*, 22 Fed. Rep. 865; *Taylor v. Holmes*, 14 Fed. Rep. 498. That the demurrer must be special, see *Stewart v. Flint*, 57 Vt. 216; *Wilson v. Hill*, 46 N. J. Eq. 367; s. c. 19 Atl. Rep. 1097; *Ward v. Clay*, 82 Cal. 502. A complainant cannot compel a demurrer upon the facts as stated in the bill, if they are imperfectly or inadequately stated. The defendant must be at liberty to plead the facts upon which he relies for his defense, in such form and with such detail as to raise the real question which he desires to present. *Davison's Ex'rs v. Johnson*, 16 N. J. Eq. 112. See, also, § 239, n. 1.

<sup>7</sup> 1 Daniell's Ch. Pr. (5th ed.) 562, 385; *United States v. Pratt Coal & Coke Co.*, 18 Fed. Rep. 708.

<sup>8</sup> 1 Daniell's Ch. Pr. (5th ed.) 562, 386, 387.

<sup>9</sup> 1 Daniell's Ch. Pr. (5th ed.) 562, 212. *Contra*, *Gove v. Pettis*, 4 Sandf. Ch. 403, where a notice to take the

those cases in which the rules of the court require that the complainant's bill should be accompanied by one.<sup>1</sup>

**§ 236. Classification of demurrers to discovery.**—A demurrer to discovery is one which points out reasons which appear upon the face of the bill why the defendant cannot be required to answer certain allegations in the bill.<sup>2</sup> These objections are:—(1) that the answer may subject the defendant to penal consequences;<sup>3</sup> (2) that it is immaterial to the purposes of the suit;<sup>4</sup> (3) that it would involve a breach of some confidence, which it is the policy of the law to preserve inviolate;<sup>5</sup> (4) that the matter which is sought to be discovered appertains to the title of the defendant;<sup>6</sup> (5) that in conscience the defendant's right is equal to the plaintiff's.<sup>7</sup>

**§ 237. Demurrers to bills for relief and discovery.**—Where a general demurrer to a bill for relief and discovery is held good to the relief but not to the discovery, the former English decisions and the decisions in America hold that the demurrer will not be a bar to the discovery. The modern English cases hold that it will, on the ground that the discovery being only the means for the relief, if that relief cannot

bill from the files was held to be the proper practice. See § 84, *supra*; *Dwight v. Humphreys*, 3 McLean, 104; *Graham v. Elmore*, Harring. Ch. 265.

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 562. See §§ 85, 86, 145, *supra*; *Findlay v. Hinde*, 1 Peters, 241, 244. A defendant is not bound to look beyond the copy of the bill which is served on his solicitor, and if that does not contain the requisite affidavit or verification to give the court jurisdiction of the case, he may demur to the bill on that ground. *Lansing v. Pine*, 4 Paige, 689.

<sup>2</sup> Langdell's Eq. Pl. 97.

<sup>3</sup> Story's Equity Pleading (10th ed.), §§ 575–599; *Stewart v. Drasha*, 4 McLean, 568; *States v. White*, 17 Fed. Rep. 561, 565; *Atwill v. Ferrett*, 2 Blatchf. 89. The objection will lie

to a particular interrogatory though the bill be in other respects unexceptionable. *Marsh v. Marsh*, 16 N. J. Eq. 391.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 570; Story's Equity Pleading (10th ed.) § 565 *et seq.* Cf. *Waring v. Suydam*, 4 Edw. Ch. 426.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 547; 1 Daniell's Ch. Pr. (5th ed.) 571; *Worthington v. Scribner*, 109 Mass. 487, 493.

<sup>6</sup> Story's Equity Pleading (10th ed.), §§ 547, 572; *Morris v. Edwards*, 15 App. Cas. 309; s. c., 28 Q. B. D. 287.

<sup>7</sup> The most obvious case is that of a purchaser for a valuable consideration without notice of the plaintiff's claim. *Jerrard v. Saunders*, 2 Vea. Jr. 458; 1 Daniell's Ch. Pr. (5th ed.) 569.

be granted the discovery is of no avail;<sup>1</sup> but a demurrer well taken as to the relief holds good as to the discovery also, provided the discovery is incidental to the relief.<sup>2</sup> When the same principle which would support a demurrer to the discovery would be applicable as a defense to the relief, the defendant cannot be permitted to demur as to the discovery only and answer as to the relief, but he may answer and make the discovery sought and demur to the relief.<sup>3</sup> If a defendant cannot answer as to particular facts charged in the bill without criminating himself or subjecting himself to a penalty or forfeiture, he may demur to the discovery and answer as to the relief.<sup>4</sup>

§ 238. What objections are reached by general demurrer. A title adverse to the mortgagor cannot be litigated in a foreclosure suit;<sup>5</sup> and if the bill shows that one of the defendants is made a party by reason of claiming such a title, he may demur for want of equity as to him.<sup>6</sup> Where a bill is so uncertain in its allegations that it cannot be ascertained from the bill who are the necessary parties to the suit, it will be bad on general demurrer.<sup>7</sup> If a bill against a husband and wife shows an interest in the husband but none in the wife, and both join in a general demurrer, it will be sustained as to her.<sup>8</sup> So if one having no interest in the subject-matter of the suit, or in the relief prayed, be joined as a party complainant, the defect may be reached by a general demurrer for want of equity.<sup>9</sup>

<sup>1</sup> *Metler v. Metler* (1867), 18 N. J. Eq. 270, 274; *Livingston v. Livingston*, 4 Johns. Ch. 294.

<sup>2</sup> *Souza v. Belcher*, 8 Edw. Ch. 117.

<sup>3</sup> *Brownell v. Curtis*, 10 Paige, 210; *Higinbotham v. Burnet*, 5 Johns. Ch. 187. See *Cuyler v. Bogert*, 3 Paige, 186. Where a bill for discovery in aid of a defense at law, which prays also for relief, does not show that a discovery is necessary as well as material, the defendant may demur to the relief sought. *March v. Davison*, 9 Paige, 580. Where the complainant upon the whole case, as

stated in the bill, is not entitled either to discovery or relief, the defendant should demur to the relief as well as the discovery. *Kuypers v. Reformed Dutch Church*, 6 Paige, 570.

<sup>4</sup> *Livingston v. Harris*, 3 Paige, 528.

<sup>5</sup> See § 75, *supra*.

<sup>6</sup> *Banks v. Walker*, 3 Barb. Ch. 438.

<sup>7</sup> *Whitaker v. Degraffenreid*, 6 Ala. 808.

<sup>8</sup> *Crane v. Deming*, 7 Conn. 387.

<sup>9</sup> *Hodge v. North Mo. Railroad*, 1 Dill. 104; *King of Spain v. Machado*, 4 Russ. 225; *Cuff v. Platell*, 4 Russ.

§ 239. What objections are not covered by general demurrer.— Under a general demurrer for want of equity no objection for want of form can properly be raised.<sup>1</sup> A complaint is not subject to demurrer on the ground that it does not state facts sufficient to constitute a cause of action because it contains no prayer for relief.<sup>2</sup> Under a rule requiring that the names and places of abode of all parties be stated in the introductory part of the bill,<sup>3</sup> a failure so to state the names is a ground of special demurrer, and the objection cannot be made under a general demurrer, nor urged in the appellate court in the absence of anything in the record showing that it was insisted upon in the lower court.<sup>4</sup> The question whether or not a defendant has an interest in a patent suit by virtue of a partnership agreement or a license to use the invention cannot be considered upon a demurrer for want of equity in the bill.<sup>5</sup> An objection to a bill of review that the original decree has not been performed cannot be raised on general demurrer, as the objection relates to the propriety of filing the bill and not to the equity of the bill when filed.<sup>6</sup>

242; *Makepeace v. Haythorne*, 4 Russ. 244; *Clarkson v. Peyster*, 8 Paige, 886.

<sup>1</sup> *Miller v. Jamison*, 24 N. J. Eq. 41. Where the bill fails to set out the complainant's title to land with sufficient certainty the defect is one of form rather than of substance and cannot be reached by a general demurrer. *Stewart v. Flint*, 57 Vt. 216; *Wilson v. Hill*, 46 N. J. Eq. 867; s. c., 19 Atl. Rep. 1097. Where a bill is without equity it may be dismissed on general demurrer, though otherwise where there is an equity defectively stated. *Puterbaugh v. Elliott*, 22 Ill. 157. Defects of averment or uncertainty cannot be considered upon general demurrer. *Ward v. Clay*, 82 Cal. 502, and cases cited.

<sup>2</sup> *Balle v. Mosley*, 13 S. C. 439, 441.

<sup>3</sup> See § 88, *supra*; *United States Equity Rule 20*.

<sup>4</sup> *McCoy v. Boley*, 21 Fla. 808. See, also, *Keen v. Jordan*, 18 Fla. 827; *Thompson v. Maxwell*, 16 Fla. 777. The question whether the court has jurisdiction or whether the remedy is to be sought in some other court cannot be raised on a demurrer upon the ground that the complaint does not state a cause of action. *McKibben v. Salinas* (S. C.), 15 S. E. Rep. 543.

<sup>5</sup> *Puetz v. Bransford*, 81 Fed. Rep. 458.

<sup>6</sup> *Cochran v. Rison*, 20 Ala. 463. On general demurrer a bill should not be dismissed because some of the parties are improper or unnecessary, or because some of the facts alleged may be superfluous or afford no cause for relief, or because some of the relief prayed for may not be appropriate. *Reese v. Reese* (Ga.), 15 S. E. Rep. 846.

§ 240. **The same subject continued.**— A demurrer cannot be sustained on the ground that a party has prayed for the wrong relief where there is also a prayer for general relief, because at the hearing the complainant may ask at the bar for the proper specific relief.<sup>1</sup> Nor will a general demurrer lie when the plaintiff shows himself entitled to an alternative relief which he has prayed for.<sup>2</sup> Where a bill is good as to account and partition, though it may be bad as to the attack it makes on a judgment lien on the premises, the bill will not be dismissed on general demurrer.<sup>3</sup> So where a bill prayed for an injunction and other relief, a general demurrer was overruled although the complainant was not entitled to the injunction.<sup>4</sup> A demurrer to the whole bill does not lie merely because the prayer for relief is too broad. The proper course in such a case is to demur to the part of the relief specifically prayed for to which the complainant is not entitled upon the case made by his bill.<sup>5</sup>

§ 241. **Demurrer to part of a bill — Plea or answer overruling demurrer.**— A defendant may demur to one part of a bill, plead to another, answer to another, and disclaim as to another. But all these defenses must clearly refer to separate and distinct parts of the bill.<sup>6</sup> A defendant may also put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes.<sup>7</sup> When the defendant demurs to part of a bill he must plead to or answer the rest.<sup>8</sup> But if there is a demurrer to a part of the bill or to the whole and a

<sup>1</sup> *Holden v. Holden*, 24 Ill. App. 106; *Wilkinson v. Beal*, 4 Mod. 408; *Hopkins v. Snedaker*, 71 Ill. 449; *Curyea v. Berry*, 84 Ill. 600; *Stanley v. Valentine*, 79 Ill. 544; *Werott v. Wicks*, 72 Ill. 524; *Crane v. Hutchinson*, 8 Ill. App. 80.

<sup>2</sup> *Gaunt v. Froelich*, 24 Ill. App. 808.

<sup>3</sup> *Lowe v. Burke*, 79 Ga. 166; s. c., 8 S. E. Rep. 449.

<sup>4</sup> *Walsh v. King*, 74 Mich. 850; s. c., 41 N. W. Rep. 1080.

<sup>5</sup> *Whitbeck v. Edgar*, 2 Barb. Ch. 106. See, also, *American F. L. Mortg. Co. v. Walker*, 81 Fed. Rep. 108.

<sup>6</sup> Mitf. & T. Eq. Pl. 411; Story's Equity Pleading (10th ed.), § 442; *United States v. American Bell Tel. Co.*, 80 Fed. Rep. 528. Whether a bill consisting of one *single* cause of suit, but made up of many inducements and circumstances tending to the same cause, can be demurred to in part, pleaded to in part, and answered in part, *quære*. *Beauchamp v. Gibbs*, 1 Bibb (Ky.), 481, 483.

<sup>7</sup> 1 Daniell's Ch. Pr. (5th ed.) 584; *Baker v. Mellish*, 11 Ves. 68; *Glegg v. Legh*, 4 Mad. 198, 207; *Thorpe v. Macaulay*, 5 Mad. 218.

<sup>8</sup> 1 Daniell's Ch. Pr. (5th ed.) 583.

plea or answer to the same part or to the whole, the demurrer is overruled.<sup>1</sup> Where a defendant demurred to both discovery and relief as to part of the complainant's bill, and answered as to the residue, but in his answer inserted a general denial of knowledge as to any matters of the bill other than those which he had answered, and concluded his answer with the usual traverse, it was held that such answer covered a part of the discovery to which the demurrer related, and therefore overruled the demurrer.<sup>2</sup>

§ 242. The same subject continued — United States Equity Rules.— The United States Rules in Equity provide that “the defendant may at any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue.”<sup>3</sup> He will not ordinarily be allowed to file a demurrer to the whole bill and at the same time several pleas, unless for good and sufficient reasons and to prevent injustice.<sup>4</sup> “No demurrer or plea shall be held bad and overruled upon argument only be-

<sup>1</sup> Story's Equity Pleading (10th ed.), § 442; Barbey's Appeal, 119 Pa. St. 418; s. c., 13 Atl. Rep. 451; Hoadley v. Smith, 86 Conn. 371; Souzer v. De Meyer, 2 Paige, 574; Clark v. Phelps, 6 Johns. Ch. 214; Summers v. Murray, 2 Edw. Ch. 205; Jarvis v. Palmer, 11 Paige, 650; Leacraft v. Dempsey, 4 Paige, 124. See, also, Holt v. Daniels, 61 Vt. 89, 98. But a demurrer by one defendant is not overruled by a plea or answer filed by another. Dakin v. Union Pac. Ry. Co., 5 Fed. Rep. 665. Where a plea or demurrer is accompanied by an answer to any part of the bill, and the plea or demurrer is overruled, the complainant must except to the answer as insufficient if he wishes to obtain a further answer as to any of the matters covered by the plea or demurrer. Kuypers v. Reformed Dutch Church, 6 Paige, 570.

<sup>2</sup> Spofford v. Manning, 6 Paige, 388.

In Massachusetts if the defendant files a demurrer to the bill and also an answer, the court may under rule 22 in chancery, allow the answer to be withdrawn, and may hear the case on the bill and demurrer; and it is not necessary that the demurrer should be again filed. The court said: — “It was formerly a rule that you could not demur and answer to the same matter, and as the demurrer was a reason for not answering, the subsequent filing of an answer overruled the demurrer. Now that a demurrer may be inserted in an answer (Rule 13), there seems to be no longer any reason why a separate demurrer should be overruled by an answer filed subsequently.” Fogg v. Price, 145 Mass. 513, 514.

<sup>3</sup> Equity Rule 32.

<sup>4</sup> United States v. American Bell Tel. Co., 30 Fed. Rep. 523.



cause such demurrer or plea shall not cover so much of the bill as it might by law have extended to.”<sup>1</sup> “No demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.”<sup>2</sup> Whether the defendant may at the same time demur and answer to the whole bill is not settled.<sup>3</sup> In such a case it has been held that “the defendant must elect between his demurrer and his answer. . . . If he should elect his demurrer and it should be overruled on the argument, he would be held probably to have waived what ordinarily and otherwise would be under Rule 34 his right to answer.”<sup>4</sup>

§ 243. **Specification of extent of demurrer.**—Where a demurrer does not go to the whole bill, it must clearly express the particular part which it is designed to cover, so that upon a reference of the answer to the residue of the bill, upon exceptions for insufficiency, the master may be able to ascertain precisely how far the demurrer goes,—how much of the bill remains to be answered.<sup>5</sup> A demurrer to such part of the bill as in certain interrogatories or “elsewhere” sought an answer, etc., was held to be a violation of the rule.<sup>6</sup> But a

<sup>1</sup> Equity Rule 86.

<sup>2</sup> Equity Rule 87. There are similar rules in Maine. Rule 6, 87 Me. 582; *Smith v. Kelly*, 56 Me. 64, 65; *Hartshorn v. Eames*, 31 Me. 97; and in Tennessee. Code, § 4819; *Harding v. Egin*, 2 Tenn. Ch. 89.

<sup>3</sup> See *Adams v. Howard*, 9 Fed. Rep. 847; *Crescent City Live-stock Co. v. Butchers' Union Live-stock Co.*, 12 Fed. Rep. 225; *Hayes v. Dayton*, 8 Fed. Rep. 702, 706.

<sup>4</sup> *Adams v. Howard*, 9 Fed. Rep. 847. See, also, *Orendorf v. Budlong*, 12 Fed. Rep. 24; *Hays v. Dayton*, 8 Fed. Rep. 702, 706.

<sup>5</sup> *Jarvis v. Palmer* (1845), 11 Paige, 650; *Van Hook v. Whitlock*, 8 Paige, 409, 418; *Leacraft v. Dempsey*, 4 Paige, 124.

<sup>6</sup> *Chicago &c. R. Co. v. Macomb*, 2 Fed. Rep. 18, where the court said:—

“The rule undoubtedly is that a special demurrer to part of a bill must point out with certainty the part demurred to. This is not only for reasons of convenience, but unless the demurrer has this precision there must be great uncertainty in the judgment if a judgment is entered sustaining the demurrer. *Atwell v. Ferrett*, 2 Blatchf. 89. The defendant's counsel relies, however, on the case of *Claridge v. Hoar*, 14 Ves. Jr. 65, as authority for rejecting the words ‘or elsewhere’ as surplusage. This was not a case of a demurrer, but of a plea, and I think it has no relevancy to the question. It would seem that if the demurrer is sustained it must be sustained as a whole; and if that is so, the judgment would evidently be uncertain as to what parts of the bill under the

demurrer to all of the bill except a particular specified part is not open to objection; and when the exception applies to a very small part only of the bill, it has been held to be the proper way of demurring.<sup>1</sup>

**§ 244. Incorporating demurrer in answer.**—In a recent Vermont case it was said that “incorporating a demurrer into an answer is often done, and no violation of the rule is occasioned if the demurrer is left for consideration as if it stood alone. In the old precedents instances may be found of demurrers and pleas incorporated into answers, but in each case the answer was provisional, the plea ending with a demand for judgment and then proceeding, ‘and if this defendant shall by order of this honorable court be compelled to make any other answer to the said bill, etc., then and not otherwise the defendant, saving, etc., answereth and saith,’ going through the answer as if no plea had been put in. The more modern practice, however, and the one sanctioned by Mitford and other standard writers, is to file each pleading by itself. But in all cases the demurrer should be brought to a hearing before the case is tried on its merits.”<sup>2</sup>

judgment on the demurrer the defendant would be excused from answering. But as both parties have also fully argued this demurrer on the merits as if it were a demurrer to the discovery sought in the enumerated interrogatories only, I have examined it as if the words ‘or elsewhere’ had been omitted or could be rejected.” In *Devonshire v. Newenham*, 2 Sch. & Lef. 199, 205, the language of Lord Redesdale upon this subject was as follows:—“It has been repeatedly said that where a defendant demurs to part and answers to part of a bill, the court is not to be put to the trouble of looking into the bill or answer to see what is covered by the demurrer, but that it ought to be expressed in clear and precise terms what it is that the party refuses to answer, so that the master,

upon a reference of the answer to him upon exceptions, should be able to ascertain precisely how far the demurrer goes and what is to be answered; and I cannot agree that it is a proper way of demurring to say that the defendant answers to such and such particular facts and demurs to all the rest of a bill; for this would put the master to great difficulty in saying what was demurred to and whether the answer was sufficient or otherwise. The defendant ought to demur to a particular part of the bill, specifying it precisely, and answer to all the rest.” See, also, *Chetwynd v. Lyndon*, 2 Ves. 450.

<sup>1</sup> 1 Daniell’s Ch. Pr. (5th ed.) 586; *Hicks v. Raincock*, 1 Cox, 40; *Howe v. Duppa*, 1 Ves. & B. 511.

<sup>2</sup> *Holt v. Daniels*, 61 Vt. 89, 98.

§ 245. General demurrer — Specification of grounds — Statutes and rules of court.— One of the rules of the New Jersey court of chancery provides that “every demurrer, whether general or special, shall state the particular grounds of the demurrer.” In adopting the construction placed upon an order in chancery in England containing a rule identical in scope and design, Vice-chancellor Van Fleet said:— “The English rule as enforced in practice may be correctly stated as follows:— Where the court finds, on looking at the complainant’s bill, that his right to relief is doubtful or uncertain, or, in the words of Sir George Jessel,<sup>1</sup> that his equity is not obvious at first sight, there a simple statement of want of equity will under the rule constitute a sufficient specification of the ground of the demurrer; but where the defect or infirmity on which the demurrer is founded is obscure or latent to such an extent that the court cannot, on inspecting the complainant’s bill, readily discern it, then the rule requires the demurrant to point out by a plain statement the specific ground on which his demurrer is founded. This construction gives full effect to the fundamental purpose intended to be accomplished by the adoption of the rule, which was to secure greater fairness and thoroughness in the discussion of questions arising on general demurrer than could be had under the old practice. . . . Under the old practice it sometimes happened that although a general demurrer was well founded in point of law, yet the ground upon which it rested was so far beyond the line of vision of the ordinary practitioner that he could not see it without having it pointed out to him, and only lawyers of very extended experience or unusual *acumen* would readily discern it. A simple allegation of want of equity gave the ordinary practitioner in such a case no information whatever of the ground on which his statement of his client’s case would be attacked. The demurrer rather emboldened than disturbed him; for, not seeing the ground of the demurrer, he supposed none existed, and he would proceed to the argument of the demurrer in ignorance of the ground on which it rested, and generally without preparation, and the consequence was that in such cases the court was either compelled to defer the case for further argument or to decide

<sup>1</sup> In *Bidder v. McLean*. L. R. 20 Ch. Div. 512.

it upon an imperfect argument. The purpose of the rule was to cure this mischief by making it the duty of a demurrant, when he filed his demurrer, to make such a disclosure of the ground of his demurrer as would render it probable, when his demurrer came on for argument, that all the questions raised by it would be fully answered and thoroughly discussed.”<sup>1</sup>

§ 246. **The same subject continued.**—The North Carolina code provides that “the demurrer shall distinctly specify the ground of objection to the complaint; unless it does so it may be disregarded.” A demurrer was filed stating that “the complaint does not contain facts sufficient to constitute a cause of action.” In overruling the demurrer the court quoted the foregoing provision of the code and said:—“These are broad words and include defects in substance as well as defects of form.” Under another section of the code providing that if no objection be taken by demurrer or answer it shall be deemed to be waived except objections to the jurisdiction and an objection that the complaint does not contain facts sufficient to constitute a cause of action, it was held that those two objections could not be taken under a demurrer general in form. “The rule is positive,” said the court; “it applies to all demurrers and cannot be modified by implication.”<sup>2</sup> By judicial construction of the Tennessee code a demurrer for want of equity which does not specify in what the want of equity consists is not available for any purpose,<sup>3</sup> except that it may be treated as a motion to dismiss.<sup>4</sup> In Alabama, under a statute providing that a demurrer to the bill must set forth the ground of demurrer specially, and otherwise it must not be heard, an assignment as cause of demurrer that “the bill contains no equity” is not sufficient and raises no question as to defects in the bill curable by amendment.<sup>5</sup>

<sup>1</sup> *Essex Paper Co. v. Greacen*, 45 N. J. Eq. 504, 506.

<sup>2</sup> *Love v. Comm'rs of Chatham*, 64 N. C. 706, 707.

<sup>3</sup> *Minerva v. Rodgers*, 1 Heisk. (Tenn.) 239.

<sup>4</sup> *Brooks v. Smith*, Thomp. Cas. 233.

<sup>5</sup> *Chambers v. Wright*, 52 Ala. 444.

See *Wellborn v. Tilter*, 10 Ala. 305, where it was said that a rule of court requiring that all demurrers shall state the matters of objection is simply an iteration of the practice which previously prevailed in all equity courts. Sec. 231, n. 2, *supra*.

§ 247. **Demurrers bad in part.**— “The rule is of general application that where the bill sets forth two or more claims for relief in equity and a general demurrer is filed by the defendant, it should be overruled and the relief granted if any of the grounds upon which relief is sought are of equitable cognizance.”<sup>1</sup> A bill was filed to have a deed canceled as a cloud on title. The allegations disclosed one state of facts on which the remedy was in chancery and another on which the remedy was at law. There was a demurrer to the whole bill on the ground that the complainant had an adequate remedy at law. The opinion of the court was that the bill contained two distinct and independent grounds on which the claim for relief was based, and that if either ground was sufficient its force was not impaired by the fact that it was joined cumulatively with another alleged ground which of itself would not maintain the equity of the bill, and the demurrer was held to have been properly overruled.<sup>2</sup> And where it was sought to have a deed set aside as a cloud on title, and the bill showed that the complainant owned only a part of the premises affected by the deed, it was held to be good as to such portion although bad as to the residue, and a general demurrer was overruled.<sup>3</sup> “A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this: that it is an absolute, certain and clear proposition that it would be so. Where the demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled.”<sup>4</sup>

<sup>1</sup> *Tillman v. Thomas*, 87 Ala. 821; 23 N. J. Eq. 466. A demurrer which is bad in part is bad *in toto*. *Atlantic Ins. Co. v. Lunar*, 1 Sandf. Ch. 91; *Kuypers v. Reformed Dutch Church*, 6 Paige, 570; *Stuyvesant v. Mayor &c.*, 11 Paige, 414; *Buffington v. Harvey*, 95 U. S. 99; *Hoxsey v. Midland*, 33 N. J. Eq. 119; *Crane v. Deming*, 7 Conn. 898; *Romaine v. Hendrickson*, 24 N. J. Eq. 232; *Davison v. Perrine*, 22 N. J. Eq. 87; *Durling v. Hammar*, 20 N. J. Eq. 220; *Fairchild v. Hunt*, 14 N. J. Eq. 867, 874; *Metler*

<sup>2</sup> *Shipman v. Furniss*, 69 Ala. 568.

<sup>3</sup> *Snow v. Counselman*, 186 Ill. 197. A complaint sufficient for a partition, but not for the cancellation of a deed for fraud, is not demurrable on the ground that a cause of action is not stated. *Cartee v. Spence*, 24 S. C. 550.

<sup>4</sup> *Vail's Executors v. Central R. Co.*,

§ 248. Demurrer for want of jurisdiction.— Where the court has not general but limited jurisdiction in equity, it is necessary that the bill should show upon its face that the court has jurisdiction of the subject-matter complained of.<sup>1</sup> Whether the court has such jurisdiction may be inquired into under a general or a special demurrer.<sup>2</sup> The doctrine applies when the objection is taken to the bill that it shows upon its

*v. Metler*, 18 N. J. Eq. 270, 278; *Banta v. Moore*, 15 N. J. Eq. 98; *Vanderson v. Stryker*, 8 N. J. Eq. 175; *Pope v. Salamanca Oil Co.*, 115 Mass. 287; *Reading v. Stover*, 82 N. J. Eq. 826; *Post v. Toledo &c. R. Co.*, 144 Mass. 841, 850; *Chazournes v. Mills*, 2 Barb. Ch. 466; *Outwater v. Berry*, 6 N. J. Eq. 68; *Whitlock v. Duffield*, 2 Edw. Ch. 866; *Kimberly v. Sells*, 8 Johns. Ch. 467; *Higinbotham v. Burnet*, 5 Johns. Ch. 184; *Verplank v. Caines* 1 Johns. Ch. 57; *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 505; *Northern Pac. R. Co. v. Roberts*, 42 Fed. Rep. 784; *Stewart v. Masterson*, 181 U. S. 151; *Chicago &c. Ry. Co. v. Hartshorn*, 80 Fed. Rep. 541; *Merriam v. Holloway Pub. Co.*, 48 Fed. Rep. 450; *Livingston v. Story*, 9 Pet. 688; *Mercantile Trust &c. Co. v. R. I. Hospital Co.*, 86 Fed. Rep. 868; *United States v. Southern Pac. R. Co.*, 40 Fed. Rep. 611; *Castleman v. Veitch*, 8 Rand. 598; *Gooch v. Green*, 102 Ill. 507; *Graves v. Downey*, 8 Mon. (Ky.) 856; *Brown v. Hogle*, 80 Ill. 119; *Shaw v. Chase*, 77 Mich. 436; *Darrah v. Boyce*, 62 Mich. 480; *Cochrane v. Adams*, 50 Mich. 17; *Mortone v. Grenada Academies*, 2 Sm. & M. 478; *Reese v. Reese* (Ga.), 15 S. E. Rep. 846; *Blount v. Garen* 3 Hayw. 188; *Hazelhurst v. Railroad Co.*, 43 Ga. 13; *Dimmock v. Bixby*, 20 Pick. 838; *Merrifield v. Ingersoll*, 61 Mich. 4. And it makes no difference in such a case how many grounds of special demurrer are also assigned if none of them touches the particular matter.

*El Modelo Cigar Mfg. Co. v. Gato* (Fla.), 7 So. Rep. 28. A demurrer may be good as to one of the defendants demurring and bad as to the others (*Mayor &c. of London v. Levy*, 8 Ves. 408; *Barstow v. Smith*, Walk. Ch. 894); provided, however, that it is a "joint and several demurrer." *Glascot v. Copper Miners' Co.*, 11 Sim. 805, 810. A joint demurrer by husband and wife, if not good as to both, will be overruled as to one and sustained as to the other. *Wooden v. Morris*, 8 N. J. Eq. 65. In the English chancery practice there have been instances in which a general demurrer has been allowed in part only (see *Story's Equity Pleading*, § 443, n. 1; *International &c. Co. v. Maurer*, 44 Fed. Rep. 618, and *Pope v. Stansbury*, 2 Bibb (Ky.), 484), but the practice there is, as it is in this country, to overrule the demurrer if not good to the whole bill, though it might have been good if filed to a part only. In such cases, however, leave will sometimes be given to amend the demurrer, so as to confine it to the objectionable part of the bill. *Kirkpatrick v. Corning*, 39 N. J. Eq. 22, 24.

<sup>1</sup> *Stephenson v. Davis*, 56 Me. 73; § 101 *et seq.*, *supra*.

<sup>2</sup> *Stephenson v. Davis*, 56 Me. 73; *May v. Parker*, 12 Pick. 85; *Boston Water-power Co. v. Boston &c. R. Co.*, 16 Pick. 516; *Southern Pac. R. Co. v. Denton*, 18 S. Ct. Rep. 44. *Cf.* *McKibben v. Salinas* (S. C.), 15 S. E. Rep. 548.

face that the defendants are residents of another State and therefore not subject to the jurisdiction of the court as a court of equity.<sup>1</sup> In the federal courts, where a bill shows on its face that the defendant is not a resident of the district, the objection may be raised by demurrer.<sup>2</sup> But in a foreclosure suit by several bondholders, the fact that one of the complainants is a citizen of the State where the suit is brought does not present a question of jurisdiction which goes to the whole case, and the objection cannot be raised upon demurrer to the whole bill. If one of the complainants cannot recover because of his citizenship, the bill as to him may be dismissed at the hearing without prejudice.<sup>3</sup> Where the bill contains a general prayer for relief as well as for a discovery, the defendant may demur if it appears upon the face of the bill that the value of the matter in controversy is insufficient to give jurisdiction.<sup>4</sup>

§ 249. **The same subject continued.**—In the federal courts the objection that a defendant was not “found” and did not reside within the district<sup>5</sup> cannot be presented by a demurrer. The privilege of being sued within a certain district is waived by a general appearance in the action.<sup>6</sup> “How can it be ascertained on demurrer,” said Wallace, J., in the case first cited, “whether the party has been properly served with process or not, or whether the personal privilege has been waived? It is not the office of a complaint to exhibit the proceedings

<sup>1</sup> *Stephenson v. Davis*, 56 Me. 78.

<sup>2</sup> But the court said:—“If the court has jurisdiction of the subject-matter, and the defendant merely asserts the privilege of being sued in some other jurisdiction, it would be more regular to assert it by motion to dismiss the bill, in those cases where the privilege of being sued elsewhere appears on the face of the bill.” *Reinstadler v. Reeves* (Mo., 1887), 83 Fed. Rep. 808, 809. See, also, *Miller Wagon Co. v. Carpenter*, 84 Fed. Rep. 438.

<sup>3</sup> *Nebraska City Nat. Bank v. Nebraska Hydraulic &c. Co.*, 14 Fed. Rep. 768. A demurrer lies where a

bill is brought in the wrong county. *Harwell v. Lehman*, 72 Ala. 344.

<sup>4</sup> *Schroeppel v. Redfield*, 5 Paige, 245. See § 101 *et seq.*, *supra*; and as to demurrer for adequate remedy at law, §§ 18, 14, *supra*.

<sup>5</sup> See U. S. R. S., § 789; §§ 86, 87, 88, *supra*.

<sup>6</sup> *Robinson v. National Stock-yard Co.*, 12 Fed. Rep. 361; *s. c.*, 20 Blatchf. 518; *Irvine v. Lowry*, 14 Peters, 296; *Flanders v. Insurance Co.*, 8 Mason, 158; *Kitchen v. Strowbridge*, 4 Wash. (C. C.) 84; *Kelsey v. Penn. R. Co.*, 14 Blatchf. 89; *Provident Savings Society v. Ford*, 114 U. S. 635, 639. See the preceding section, and §§ 221, 222, *supra*.



which have caused the defendant's appearance in the action. The complaint treats the defendant as present in court and exhibits the issue between the parties. How the defendant came there is an extraneous matter. If the person selected as a defendant is one who is not subject to the jurisdiction of the court, and this is apparent upon the pleading, the objection may be reached by demurrer. If a party is subject to the jurisdiction, it may be that jurisdiction has not been properly acquired; but this would present a question, not of pleading, but one of practice."<sup>1</sup>

**§ 250. Demurrer for incapacity to sue.**— If a person under disability, such as an infant, or a married woman, or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur.<sup>2</sup> If the incapacity does not appear upon the face of the bill the defendant must take advantage of it by plea. The objection will hold to a bill of discovery as well as to a bill for relief.<sup>3</sup> Where a lunatic himself is not made a party complainant in a suit brought by his committee in relation to personal estate, the objection may be waived by the defendant's neglecting to set it up by way of demurrer or answer; and it cannot be raised merely by a general demurrer for want of equity.<sup>4</sup> So where the bill shows that the complainant is an uncertified bankrupt suing for property which has clearly passed to his assignees,<sup>5</sup> or that the complainant sues as administrator by

<sup>1</sup> The clause in the New York code which provides that where the court has no jurisdiction of the person of the defendant the objection may be taken by answer does not apply to an objection that the original process was improperly served. The defendant must relieve himself from such irregularity by motion. *Nones v. Hope Mut. L. Ins. Co.*, 5 How. Pr. 96, where the head-note states that the objection is not available by answer or demurrer.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 494.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 494.

<sup>4</sup> *Gorham v. Gorham*, 8 Barb. Ch. 24. Where it is said that lunatics must sue by their committee, it is not meant that the suit is to be brought by the committee in his own name, merely describing himself as the committee, but that the suit should be brought in the name of the lunatic, stating that he sues by the committee of his estate, naming them; as in the case of an infant suing by his next friend. *Gorham v. Gorham*, *supra*.

<sup>5</sup> *Benfield v. Solomons*, 9 Ves. 77.

virtue of letters of administration granted in a foreign State, a demurrer will lie.<sup>1</sup> The question as to the capacity of the complainant to sue can be raised only by demurrer or by plea in the nature of a plea in abatement, and not after a hearing on the merits.<sup>2</sup>

§ 251. The same subject continued.—It was held in Indiana that a statutory cause of demurrer “that the plaintiff has not legal capacity to sue” refers only to some legal disability, such as infancy, idiocy or coverture, and not to the fact that the bill upon its face fails to show a right of action in the complainant;<sup>3</sup> and, moreover, that the capacity of the complainant to sue cannot be raised on a general demurrer for want of equity.<sup>4</sup> In South Carolina, under a similar statute, it seems to have been conceded that if a corporation complainant has no legal existence, advantage of it may be taken by demurrer, but the facts must appear affirmatively upon the face of the bill; and the performance of conditions precedent to a corporate existence is a matter of proof, and the failure to allege such performance is not ground of demurrer.<sup>5</sup>

§ 252. Demurrer for want of parties.—“The rule is elementary that whenever the want of proper parties appears upon the face of the bill it constitutes a good cause of demurrer.”<sup>6</sup> If the case made by the bill entitles the com-

<sup>1</sup> *Tourton v. Flower*, 8 P. Wms. 369; Story's Equity Pleading (10th ed.), § 496; *Duchesse d' Auxy v. Porter*, 41 Fed. Rep. 68.

<sup>2</sup> *City of Chicago v. Cameron*, 22 Ill. App. 91.

<sup>3</sup> *Dale v. Thomas*, 67 Ind. 570; *Debolt v. Carter*, 81 Ind. 855; *Bray v. Black*, 54 Ind. 417.

<sup>4</sup> *Wiles v. Trustees &c.*, 63 Ind. 206; *State v. Stout*, 61 Ind. 143; *Story v. Osdeo*, 23 Ind. 826; *Rogers v. Laf. A. Works*, 52 Ind. 296.

<sup>5</sup> *Cheraw v. Chester R. Co.*, 14 S. C. 51. See, also, *Patterson v. Pagan*, 18 S. C. 589. In *German Reformed Church v. Von Penchelstein*, 27 N. J. Eq. 80, an objection to a bill filed by

a corporation that it does not aver that the complainants are a corporation, was held to be an objection of form which cannot be raised under a general demurrer for want of equity.

<sup>6</sup> *Jessup v. Illinois Cent. R. Co.*, 36 Fed. Rep. 735, 736; *Taylor v. Holmes*, 14 Fed. Rep. 498, 501; Story's Equity Pleading (10th ed.), § 541; *Cockburn v. Thompson*, 16 Vea. 325; *Penny v. Watts*, 2 Phil. 149. The defect must appear upon the face of the bill. *Carpenter v. Ingalls* (So. Dak.), 51 S. W. Rep. 948. The objection for want of proper parties where the defect is apparent on the face of the bill should be taken by demurrer or

plainant to particular relief against the defendant, and would also entitle him to further relief were the necessary parties before the court, and where the prayer of the bill specifically asks for the more extended relief, the defendant may demur to the whole bill for want of parties.<sup>1</sup>

§ 253. The same subject continued — Effect of sustaining demurrer.— Where the objection for want of proper parties is taken by demurrer, if sustained the defendant will be entitled to his costs;<sup>2</sup> but if not taken until the hearing, although it be sustained and leave granted to the complainant to amend, the defendant is not usually entitled to costs.<sup>3</sup> Where, after demurrer allowed for want of parties, the plaintiff is permitted to amend by adding parties, he is likewise permitted to amend by charging all such matters as constitute the equity of the case against the new defendant.<sup>4</sup> When a necessary party is added to a bill it is an original bill as to him, and he is entitled to all the time to plead, answer and demur thereto which by law and the rules of the court is allowed to an original defendant.<sup>5</sup>

§ 254. Demurrer for misjoinder of parties.— It is well settled that for a misjoinder of parties defendant those only can demur who are improperly joined.<sup>6</sup> The proper practice

motion to dismiss. *Prentice v. Kimball*, 19 Ill. 320; *Deniston v. Hoagland*, 67 Ill. 265; *Conwell v. Watkins*, 71 Ill. 488; *Allen v. Woodruff*, 96 Ill. 11. See, also, *Scott v. Bennett*, 6 Ill. 646; *King v. Goodwin*, 130 Ill. 102. But in some cases the objection may be taken in the answer or at the hearing. *Robinson v. Smith*, 3 Paige, 222; *Mitchell v. Lenox*, 2 Paige, 281; § 78, *supra*. It has been held in England that, upon a demurrer for want of equity, a defect of parties may be taken as well as an objection that persons are improperly made complainants. See *Story's Equity Pleading* (10th ed.), § 548, n.

<sup>1</sup> *Dart v. Palmer*, 1 Barb. Ch. 92.

<sup>2</sup> *Story's Equity Pleading* (10th ed.), § 541.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 541; *Court v. Jeffery*, 1 Sim. & Stu. 105; *Mitchell v. Bailey*, 3 Mad. 61.

<sup>4</sup> *Stephens v. Frost*, 2 Y. & Coll. 297. See *Gibson v. Ingo*, 5 Hare, 156.

<sup>5</sup> *Hoxey v. Carey*, 12 Ga. 584. But where no decree is prayed against a new party to a bill, brought in by amendment, it is not requisite to extend to such party the time allowed to an original defendant for the purpose of filing an answer. *McDougald v. Dougherty*, 14 Ga. 674.

<sup>6</sup> *Warthen v. Brantley*, 5 Ga. 570; *Whitbeck v. Edgar*, 2 Barb. Ch. 106; *Toulmin v. Hamilton*, 7 Ala. 362; *Miller v. Jamison*, 24 N. J. Eq. 41; *Gartland v. Dunn*, 11 Ark. 720; *Payne v. Perry*, 3 Tenn. Ch. 154; *New York &c. R. Co. v. Schuyler*, 17 N. Y.

where a defect of parties is developed by the bill itself and a special demurrer is interposed on that ground is to sustain the demurrer and dismiss the bill unless the complainant asks leave to amend by bringing in other parties. But when the demurrer is general the court should look alone to the equities of the bill, and if the facts of the bill should stand with proper parties, it should overrule the demurrer and order such parties to be brought in as are indispensable to a full settlement of the matters in interest between the parties already before the court.<sup>1</sup> But want of parties will not be considered on a special demurrer in which this is not set down among the causes assigned.<sup>2</sup>

§ 255. **Formal requisites of demurrer for want of parties.**—The rule is that a demurrer for want of parties must show who the parties are, not by name, for that the defendant might not be able to do, but in such manner as to point out the defect in the bill and to enable the complaint to amend it by making proper parties.<sup>3</sup> But this rule does not apply where it appears from the face of the bill that the complain-

592; *Christian v. Crocker*, 25 Ark. 327; *Great Western Compound Co. v. Aetna Ins. Co.*, 40 Wis. 373; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Sweet v. Converse*, 88 Mich. 1; s. c., 49 N. W. Rep. 899; § 80, *supra*. See *Pringle v. Crooks*, 8 Y. & Coll. 666. When a bill is sufficient as to one of several defendants it will not be dismissed, although it may be insufficient as to another defendant who has not appeared and defended the suit. *Garner v. Lyle*, 85 Miss. 176.

<sup>1</sup> *Eagle v. Beard*, 83 Ark. 497.

<sup>2</sup> *Nash v. Smith*, 6 Conn. 422. A special demurrer for want of proper parties as defendants may be met by citing in the parties omitted. *Sears v. Hotchkiss*, 25 Conn. 171, 177. The bill is not demurrable for want of proper parties defendant when all the persons whose rights are to be affected by the decree are joined. *Swedesborough Church v. Shivers*,

16 N. J. Eq. 453. Where the claim made by a railroad company against another is for the retention of rolling stock by receivers, and such claim is preferred by intervention in a pending suit against defendant, and it appears that the claim is fully vested in the intervenor, it is improper to join with it in the petition the original plaintiff, and a demurrer to the petition will be sustained on that ground. *Central Trust Co. of New York v. Wabash &c. Ry. Co.*, 46 Fed. Rep. 156.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 543; *Attorney-general v. Poole*, 4 Myl. & Cr. 17; *Pyle v. Price*, 6 Ves. 781; *Attorney-general v. Jackson*, 11 Ves. 369; *Chapman v. Hamilton*, 19 Ala. 121; *Craddock v. American Freehold L. & M. Co.*, 88 Ala. 281; *Chambers v. Wright*, 52 Ala. 444; *Robinson v. Dix*, 18 West Va. 528.

ant has sufficient information as to the names, interests and residences of the proper parties.<sup>1</sup>

§ 256. Demurrer for defect of parties.— A demurrer for defect of parties cannot be sustained unless the bill itself shows the defect.<sup>2</sup> Thus in a suit to foreclose a mortgage the owner of the equity of redemption is the only necessary party defendant, and in an action against a sole defendant not the maker of the note and mortgage, a bill which, after the usual allegations as to the making of the note and mortgage, alleged that the defendant had or claimed to have some interest in or lien upon the mortgaged premises, which interest or lien was inferior and subordinate to the mortgage, a demurrer on the ground of defect of parties, in that the makers of the note and mortgage were not joined as defendants, was overruled. “We do not think the complaint shows upon its face,” said the court, “that any other person is a necessary defendant, because its allegations are entirely consistent with this sole defendant being the owner of the mortgaged premises and the only person having a right to redeem the same, in which case he would be the only necessary defendant. In other words, the only strictly necessary party defendant is the owner of the equity of redemption, and the complaint does not show that the defendant is not such owner. If it should transpire on the trial that he was only a subsequent lien-holder, the plaintiff’s action would fail; if, on the other hand, he proves to be the owner of the premises, it would not fail, and because the complaint is quite consistent with the conditions under which there would be no failure on account of defect of parties defendant it is not demurrable on that ground.”<sup>3</sup>

<sup>1</sup> *Taylor v. Holmes*, 14 Fed. Rep. 498, 501. Where a bill for foreclosure alleged that the mortgagor’s wife, “Matilda C.,” joined him in the execution of the mortgage, a demurrer for want of parties in that “Martha C.” was not joined as a party defendant was overruled. *Craddock v. American Freehold L. & M. Co.*, 88 Ala. 281; s. c., 7 S. Rep. 196.

<sup>2</sup> *Carpenter v. Ingalls* (S. Dak.), 51 S. W. Rep. 948. If only a part of the bill is insufficient as to parties a demurrer to the whole bill for want of parties is bad. *Laughton v. Harden*, 68 Me. 208.

<sup>3</sup> *Carpenter v. Ingalls* (S. Dak.), 51 S. W. Rep. 948.

§ 257. Statute of limitations as a ground of demurrer.—Where upon the face of the bill relief is barred by the statute of limitations, the objection may be taken by demurrer.<sup>1</sup> “Lord Redesdale seems to have held that the defense could only be taken by plea or answer,<sup>2</sup> but this is certainly not the present doctrine.”<sup>3</sup> If it does not distinctly appear from the bill that the suit is barred by limitation, a demurrer setting up the statute should be overruled.<sup>4</sup> Where relief is sought on the ground of fraud, the weight of authority is in favor of the proposition that if the party injured by the fraud remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered,<sup>5</sup> and upon a demurrer setting up the stat-

<sup>1</sup> *Bell v. Johnson*, 111 Ill. 374; *Henry County Supervisors v. Winnebago Drainage Co.*, 52 Ill. 454; *Ilett v. Collins*, 108 Ill. 74; *Hubbard v. United States Mortgage Co.*, 14 Ill. App. 40; *Bonney v. Stoughton*, 18 Ill. App. 562; *Conover v. Wright*, 6 N. J. Eq. 613; *Olden v. Hubbard*, 84 N. J. Eq. 85, 86; *Bird v. Inslee*, 23 N. J. Eq. 363; *Buckman v. Decker*, 23 N. J. Eq. 283; *Van Hook v. Whitlock*, 7 Paige, 878; *Rhode Island v. Massachusetts*, 15 Pet. 233; *Harpending v. Reformed Dutch Church*, 16 Pet. 455, 486; *Noyes v. Crawley*, 10 Ch. D. 31; *Dawkins v. Penrhyn*, 4 App. Cas. 51; s. c., 6 Ch. D. 818; *Caldwell v. Montgomery*, 8 Ga. 106; *French v. Dickey*, 8 Tenn. Ch. 302; *Pierson v. David*, 1 Iowa, 23; *Wilhelm's Appeal*, 79 Pa. St. 120, 125, 134.

<sup>2</sup> *Mitford's Eq. Pl.*, by Jeremy, 272, 273.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 484, n., § 503. “We consider it now to be the well-settled principle and practice of courts of equity that advantage may be taken of the statute of limitations by demurrer, provided the lapse of time appears on the plaintiff's bill, without any reason being set forth to show that it should

not apply.” *Wilhelm's Appeal* (1875) 79 Pa. St. 120, 125, 134. “Ordinarily courts of equity adopt the time fixed by statute for barring claims at law in analogous cases as the period at the end of which they will conclude recovery in equity.” *Reynolds v. Sumner*, 126 Ill. 58; s. c., 9 Am. St. Rep. 523; an article on “Legal and Equitable Limitation,” by W. Archer Cocke, Esq., in 7 Va. L. Jour. 385; *Beach on Modern Equity Jurisprudence*, § 20. As to the practice of the United States courts in following State statutes of limitation, see *Kirby v. Lake Shore &c. R. Co.*, 120 U. S. 130, 136; *Fogg v. St. Louis &c. R. Co.*, 17 Fed. Rep. 871, 873; *Pulliam v. Pulliam*, 10 Fed. Rep. 53; *Cleveland Insurance Co. v. Reed*, 1 Biss. 180; *Reeves v. Vinacke*, 1 McCrary, 213, 217.

<sup>4</sup> *Bacon v. Rives*, 106 U. S. 99; *Muir v. Trustees &c.*, 3 Barb. Ch. 477.

<sup>5</sup> *Avery v. Cleary*, 132 U. S. 604; *Bailey v. Glover*, 21 Wall. 342, 349; *Kirby v. Lake Shore &c. R. Co.*, 120 U. S. 130, 136; *Beach on Modern Equity Jurisprudence*, § 83, discussing what constitutes discovery within the rule.

ute the court will not infer that the facts constituting the fraud were discovered at the time when the fraud is alleged to have been committed.<sup>1</sup>

§ 258. Demurrer for laches.—The defense of laches on the part of the complainant may be set up under general demurrer where the laches is apparent on the bill itself.<sup>2</sup> And

<sup>1</sup> *Jones v. Slauson*, 88 Fed. Rep. 682; *Johnson v. Powers*, 18 Fed. Rep. 815; *Shelton v. Keokuk Nor. Line Packet Co.*, 8 Fed. Rep. 769, 777. See, also, *Radcliff v. Rowley*, 2 Barb. Ch. 28.

<sup>2</sup> *Beach on Modern Equity Jurisprudence*, § 17; *Bryan v. Kales*, 134 U. S. 126; *Lansdale v. Smith*, 106 U. S. 891; *McCabe v. Mathews*, 40 Fed. Rep. 838; *St. Louis &c. R. Co. v. Terre Haute &c. R. Co.*, 33 Fed. Rep. 440; *Fellows v. Hyman*, 38 Fed. Rep. 318; *Horsford v. Gudger*, 35 Fed. Rep. 888; *Naddo v. Bardon*, 51 Fed. Rep. 493; *Hinchman v. Kelley*, 54 Fed. Rep. 63; *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 13 S. Ct. Rep. 944, affirming s. c., 36 Fed. Rep. 722; *Maxwell v. Kennedy*, 8 How. 210; *Mercantile Bank v. Carpenter*, 101 U. S. 567; *Brown v. County of Buena Vista*, 95 U. S. 159; *Bank v. Carpenter*, 101 U. S. 568; *Speidel v. Henrici*, 120 U. S. 387; s. c., 7 S. Ct. Rep. 610; *Partridge v. Wells*, 80 N. J. Eq. 176; *Williams v. Hart*, 116 Mass. 513; *Fogg v. Price*, 145 Mass. 513, 516; *Plymouth v. Russell Mills*, 7 Allen, 488; *Olden v. Hubbard*, 84 N. J. Eq. 85, 86; *Rolfe v. Gregory*, 81 L. J. Ch. 710; s. c., 10 W. R. 711; *Dossee v. Mookerjee*, 7 Moo. Ind. Ap. 4; *Dringer v. Jewett*, 43 N. J. Eq. 701; s. c., 13 Atl. Rep. 664. But see *Beekman v. Hudson River &c. Ry. Co.*, 35 Fed. Rep. 3. The defense of laches may be enforced in proper cases wherein the facts appearing call for it, whether they arise upon the bill and pleadings or upon the

whole case as presented by the evidence. The court will often take notice of it, even though the objection is not made by the parties. *Larkin v. Sierra &c. Min. Co.*, 25 Fed. Rep. 387, and cases there cited; *Sullivan v. Portland &c. R. Co.*, 94 U. S. 811; *Richards v. Mackall*, 124 U. S. 183; *Taylor v. Holmes*, 127 U. S. 489; *Norris v. Haggin*, 136 U. S. 386; *Woelensak v. Reiher*, 115 U. S. 96. The withdrawal of a demurrer to a bill is no waiver of the defense of laches, and it may be set up in the answer. *Snow v. Boston Blank-Book Manuf'g Co.*, 158 Mass. 456; s. c., 26 N. E. Rep. 1116. The defense of laches is peculiar to courts of equity and applies although no statute of limitations governs the case. *Bell v. Hudson*, 73 Cal. 285; s. c., 2 Am. St. Rep. 791; *Harwood v. Railroad Co.*, 17 Wall. 81; *Sullivan v. Portland &c. R. Co.*, 94 U. S. 811; *Godden v. Kimmell*, 99 U. S. 201; *Sheldon v. Rockwell*, 9 Wis. 181; s. c., 76 Am. Dec. 265; *Harrison v. Gibson*, 28 Gratt. 212; *Stout v. Seabrook*, 30 N. J. Eq. 189, 190; *Matter of Neilley*, 95 N. Y. 890; *Groenendyke v. Coffeen*, 109 Ill. 829. "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles and forbids the spying-out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property and of every claimant that he make known his claims. It gives to the actual and longer possessor



especially "where the complainant undertakes in the bill to account for the delay, no necessity exists for an answer, the facts fully showing the delay appearing in the bill and a demurrer brings before the court the sufficiency of the allegations."<sup>1</sup> A presumption of payment of a mortgage from lapse of time may be raised by demurrer, and such a demurrer does not admit the allegations of a bill that both the principal and interest of the mortgage are now due and owing, because such allegations are rather conclusions than averments of fact.<sup>2</sup>

**§ 259. The same subject continued.**— But a demurrer for laches less than the statutory period will not be sustained unless the bill upon its face, without resorting to inferences, makes a clear case of unreasonable delay.<sup>3</sup> A bill will not be dismissed on demurrer, on the ground of laches, in a case where there is no analogous statutable bar, unless it appears on the face of the bill that the complainant has delayed suing for so long a time after his cause of action arose as to deprive the court of the power of ascertaining with reasonable certainty what the truth is with respect to the matter in litiga-

security and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many." Justice Brewer in *Naddo v. Bardon*, 51 Fed. Rep. 498, 495. *Hall v. Fullerton*, 69 Ill. 448, is in point. There it was held that the rule requiring a defendant in a chancery suit to set up and insist on the complainant's laches in filing his bill is for the purpose of enabling the complainant to amend his bill and account for the delay so as to admit proof to meet the objections, and will not be extended to a case where the bill attempts to account for the

delay. "Where the laches of a complainant sufficient to bar a recovery appears on the face of a bill," said the court, "no reason is perceived which would prevent a defendant from raising the question as to the sufficiency of the bill as well by demurrer as by answer, and this is believed to be fully supported by the authorities." Where some of the defendants demur on the ground of the staleness of the claim, while others do not, it is error to dismiss as to all. *Solomon v. Solomon*, 81 Ala. 505.

<sup>1</sup> *Furlong v. Riley*, 103 Ill. 628.

<sup>2</sup> *Olden v. Hubbard*, 34 N. J. Eq. 85.

<sup>3</sup> *Jones v. Slauson*, 38 Fed. Rep. 632; *Denstons v. Morris*, 2 Edw. Ch. 58; *Kittle v. De Graaf*, 80 Fed. Rep. 689; *Partridge v. Wells*, 80 N. J. Eq. 176; *Hazard v. Dillon*, 84 Fed. Rep. 485.

tion or that he has by his delay placed himself in a position where he has gained an unfair advantage over his adversary.<sup>1</sup>

**§ 260. The statute of frauds as a ground of demurrer.**— If in a bill for specific performance the agreement as stated in the bill appears to be a parol agreement only and no sufficient grounds are alleged to take the case out of the statute, the defendant may, by demurrer, object to any relief founded thereon.<sup>2</sup> A demurrer is, in effect, the same as an answer which admits the parol agreement but claims the benefit of the statute.<sup>3</sup> Thus where a bill to enforce an express trust concerning land, and praying for discovery and relief, shows on its face that the agreement was not in writing, a demurrer will lie both to the discovery and the relief.<sup>4</sup> And the objection that the contract as alleged in the bill was not to be performed within one year may be taken advantage of by demurrer.<sup>5</sup> But if the bill alleges such a part performance as will take the agreement out of the statute, a demurrer precludes the defendant from the benefit of the statute.<sup>6</sup> So, unless it affirmatively appears that the contract is by parol it will be presumed to be in writing, and a demurrer will not hold; in such a case the statute must be insisted upon in a plea or answer.<sup>7</sup>

**§ 261. Demurrer for want of title in complainant.**— It is well settled that the complainant cannot maintain his suit

<sup>1</sup> *Le Gendre v. Byrnes*, 44 N. J. Eq. 372. In a case heard by a single justice upon bill and demurrer and reserved thereon, an objection of laches not taken in the demurrer nor assigned *ore tenus* at the hearing is not open to the defendant at the argument before the full court. *Somerby v. Buntin*, 118 Mass. 278. See also, *Nash v. New England & Co. Ins. Co.*, 127 Mass. 91. But where by the terms of the report of a single justice to the full court, the case is submitted upon the facts agreed by the parties, no question of equity pleading being raised, the defense of laches may be relied on though not set up in the answer. *Learned v. Foster*, 117 Mass. 365.

<sup>2</sup> *Cozine v. Graham* (1880), 2 Paige, 177; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Macey v. Childress*, 2 Tenn. Ch. 443; *Ahrend v. Odiorne*, 118 Mass. 261.

<sup>3</sup> *Van Dyne v. Vreeland*, 11 N. J. Eq. 370.

<sup>4</sup> *Slack v. Black*, 109 Mass. 496; *Campbell v. Brown*, 129 Mass. 23.

<sup>5</sup> *Somerby v. Buntin*, 118 Mass. 278.

<sup>6</sup> *Van Dyne v. Vreeland*, 11 N. J. Eq. 370.

<sup>7</sup> *Cozine v. Graham*, 2 Paige, 177; *Champlin v. Parish*, 11 Paige, 405; *Macey v. Childress*, 2 Tenn. Ch. 443, 448.

unless he both avers and establishes by proof, where the averment is denied, that he has an interest in the subject-matter of the suit or right to the thing demanded and a proper title to institute the suit.<sup>1</sup> If such want of title appears upon the face of the bill the objection may be taken by general demurrer for want of equity.<sup>2</sup> But where the bill shows a title apparently good the defendant may by plea or answer show either that nothing was ever vested in the complainant or that the title which he had has been transferred to another.<sup>3</sup> Where two persons join as complainants, both must have an interest in the subject-matter of the suit, and both be entitled to relief; and if the bill itself shows that one of the complainants is not entitled to relief, it is demurrable.<sup>4</sup> Where a bill to quiet title shows the source and nature of the complainant's title, and contains an allegation that his title is clear and undisputed, a demurrer to the whole bill will be taken to admit only such title as the facts stated disclose.<sup>5</sup>

**§ 262. Demurrer for multifariousness.**— Upon a demurrer for multifariousness it should be distinctly specified in the pleading as a ground of objection. Otherwise it will be deemed to be waived, and cannot ordinarily be insisted on at the hearing or after decree rendered.<sup>6</sup> A mere allegation

<sup>1</sup> Story's Equity Pleading (10th ed.), § 728; § 105, *supra*.

<sup>2</sup> Hodge v. North Mo. R. Co., 1 Dill. 104. Citing Cuff v. Platell, 4 Russ. 242; Makepeace v. Haythorne, 4 Russ. 244; Clarkson v. Peyster, 8 Paige, 886, and especially King of Spain v. Machado, 4 Russ. 225. See, also, Northern Pac. R. Co. v. Amacker (C. C. App.), 49 Fed. Rep. 529.

<sup>3</sup> Barr v. Clayton, 29 West Va. 256; Story's Equity Pleading (10th ed.), §§ 260, 261, 728.

<sup>4</sup> Vaughn v. Lovejoy, 34 Ala. 437; Moore v. Moore, 17 Ala. 631; Tucker v. Holly, 20 Ala. 426; Jones v. Quinpiac Bank, 29 Conn. 25. A general demurrer is good. Dias v. Bouchand, 10 Paige, 445. A demurrer to the bill because the complainant failed

to show any title or interest in the premises, but which contained no specific suggestions, was treated as a general demurrer for want of equity, although not conforming exactly to that pleading. Merrifield v. Ingersoll, 61 Mich. 4.

<sup>5</sup> Preston v. Smith, 26 Fed. Rep. 884. A bill by persons claiming to be next of kin against executors for an account, making persons claiming an interest in the personal estate as next of kin parties defendant, but alleging that the latter have no interest in it, is demurrable as to them. Muir v. Trustees &c., 3 Barb. Ch. 477.

<sup>6</sup> §§ 126, 127, 128, *supra*; Labadie v. Hewitt, 85 Ill. 341. Cf. Whiteside County v. Burchell, 31 Ill. 68.

"that the bill is multifarious" is informal; it should state that the bill unites distinct matters upon one record and show the inconvenience of so doing.<sup>1</sup> The rule that where there is a misjoinder of parties defendant a demurrer by those who are not affected cannot be sustained is applied when there is a misjoinder of matters, but no misjoinder as to the party demurring.<sup>2</sup> A demurrer for want of equity and multifariousness may be overruled if the bill although multifarious states a case for equitable relief, since the costs are in the control of the court.<sup>3</sup>

§ 263. **Demurrers to amended bills.**—An amended bill is open to demurrer the same as an original bill; and even where a demurrer to the original bill has been overruled a demurrer to an amended bill has been allowed.<sup>4</sup> Where an amendment to a bill is inconsistent with and makes a new case from the original bill, it is a good ground of demurrer.<sup>5</sup> The objection that the complainant has submitted to the master's report upon exception taken to the answer to the original bill, and that the amendments to the bill do not make a new case calling for further discovery, cannot be raised by demurrer to the discovery sought by such amended bill.<sup>6</sup> It is proper to entitle a demurrer to an amended bill as such instead of entitling it a demurrer to the original and amended bill.<sup>7</sup>

§ 264. **Demurrer ore tenus.**—It is the settled practice that where a demurrer is put in to the whole bill for causes

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 586.

<sup>2</sup> *Torrent v. Hamilton* (Mich.), 54 N. W. Rep. 634.

<sup>3</sup> *Storrs v. Wallace*, 54 Mich. 112. Where plaintiff seeks damages for anxiety and harassment arising from the facts complained of, and for expenses in taking care of the property, a demurrer will not be sustained for misjoinder of actions, since there can be no recovery of damages for the causes stated, and those allegations are surplusage. *Newman v. Smith*, 77 Cal. 22; s. c., 18 Pac. Rep. 791.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 582;

*Moore v. Armstrong*, 9 Porter (Ala.), 697; *Bancroft v. Wardour*, 2 Bro. C. C. 66; s. c., 2 Dick. 672; *Bosanquet v. Marsham*, 4 Sim. 573; *Horton v. Thompson*, 3 Tenn. Ch. 575. But a defendant cannot put in a general demurrer to an amended bill after answering the original bill. *Atkinson v. Hanway*, 1 Cox, 860.

<sup>5</sup> *Larkins v. Biddle*, 21 Ala. 252; *Winter v. Quarles*, 43 Ala. 692.

<sup>6</sup> *Chazournes v. Mills*, 2 Barb. Ch. 466.

<sup>7</sup> *Smith v. Bryon*, 3 Madd. 428.

assigned on the record, if those causes are overruled the defendant will be allowed to assign other causes *ore tenus* at the argument.<sup>1</sup> But the demurrer *ore tenus* must be for some cause which covers the whole extent of the demurrer on the record,<sup>2</sup> and both must go to the whole bill and not to a part only.<sup>3</sup> A misjoinder may be assigned as cause for demurrer *ore tenus* under a general demurrer for want of equity, although the latter be overruled.<sup>4</sup> Where a general demurrer to the whole bill for want of equity is overruled, the defendant may demur *ore tenus* upon the ground that the suit is brought by a *feme covert* in her own name when she should have prosecuted by her next friend.<sup>5</sup> Upon a general demurrer for want of equity the defendant may demur *ore tenus* for want of jurisdiction.<sup>6</sup>

§ 265. The same subject continued — Costs.— If a party cannot sustain the demurrer on the record, and avails himself of the right to demur *ore tenus*, he must pay the costs of the written demurrer;<sup>7</sup> and he will not generally be entitled to costs upon sustaining the demurrer *ore tenus*; for if the objections had been formally stated, the complainant might have submitted to the demurrer and asked leave to amend his bill.<sup>8</sup>

§ 266. Filing a demurrer.— The United States Rules in Equity provide that “it shall be the duty of the defendant, unless his time shall otherwise be enlarged, for cause shown

<sup>1</sup> Barrett v. Doughty, 25 N. J. Eq. 880; Forbes v. Whitlock, 8 Edw. Ch. 446; Dick v. Oil Well Supply Co., 25 Fed. Rep. 105, where the defendant denied the complainant's right to sue on a patent as a receiver.

<sup>2</sup> Barrett v. Doughty, 25 N. J. Eq. 880.

<sup>3</sup> Shepherd v. Lloyd, 2 Y. & Jer. 490; Story's Equity Pleading (10th ed.), § 464.

<sup>4</sup> Barrett v. Doughty, 25 N. J. Eq. 880.

<sup>5</sup> Garlick v. Garlick, 8 Paige, 440.

<sup>6</sup> Barber v. Barber, 5 Jur. (N. S.) 1197; s. c., 29 L. J. Ch. 49.

<sup>7</sup> Garlick v. Garlick, 8 Paige, 440; Forbes v. Whitlock, 8 Edw. Ch. 446;

Robinson v. Smith, 8 Paige, 222; Van Cleef v. Sickels, 2 Edw. Ch. 392, 398.

<sup>8</sup> Taylor v. Holmes, 14 Fed. Rep. 498. Where there was a good demurrer for informality which the court would allow to be amended on the complainants paying costs, and the defendant obtained a dismissal of the bill on a demurrer *ore tenus*, upon which, if alone, he would have to pay costs, no costs were given to either party. Gove v. Pettis, 4 Sandf. Ch. 408. If an objection for want of proper parties be made *ore tenus* at the hearing, the complainant will be allowed to amend without costs. Taylor v. Holmes, 14 Fed. Rep. 498, 501.

by a judge of the court upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance. In default thereof the plaintiff may at his election enter an order (as of course) in the order-book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order if the same can be done without an answer and is proper to be decreed."<sup>1</sup> The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court, file a demurrer or plea.<sup>2</sup> The court will, upon a special application and satisfactory grounds shown, allow a defendant to put in a demurrer to the whole bill after the time for demurring alone has expired.<sup>3</sup> After answer it is too late to demur unless the answer is first withdrawn.<sup>4</sup>

§ 267. Title of a demurrer.—A demurrer must be entitled in the cause, and is headed, "The demurrer of A. B. (or, of A. B. and C. D.), one, etc., of the above-named defendants to the bill of complaint of the above-named plaintiff." If it be accompanied by a plea or by an answer it should be called in the title "the demurrer and plea" or "demurrer and answer."<sup>5</sup> A demurrer to an amended bill need not be entitled as a demurrer to the original and amended bill but as a demurrer to the amended bill.<sup>6</sup>

§ 268. Protestation clause.—A demurrer is commonly preceded by a protestation against the truth of the matters

<sup>1</sup> Equity Rule 18.

<sup>2</sup> Equity Rule 82. See, also, *East India Co. v. Hinchman*, 8 Bro. Ch. Rep. 372; *Lowesby v. Warder*, 2 Cox Cas. 268.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 592; *Bruce v. Allen*, 1 Mad. 556. See, also, *Lakens v. Fielden*, 11 Paige, 644; *Davenport v. Sniffen*, 1 Barb. Ch. 228.

<sup>4</sup> *Brill v. Stiles*, 85 Ill. 805, 810.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 585.

See, also, *Taylor v. Holmes*, 14 Fed. Rep. 498.

<sup>6</sup> *Smith v. Bryon*, 8 Madd. 428. A demurrer filed in a cause and acted upon as valid and stating a ground of demurrer in proper form will be regarded as a valid demurrer by the appellate court although it does not contain the names of the parties or of the court. *Eigenman v. Rockport &c. Ass'n*, 79 Ind. 41.

contained in the bill.<sup>1</sup> It is a practice derived from the common law, and was probably intended to avoid any conclusion in another suit; and it has no effect in limiting admissions as to the facts properly alleged in the pending suit.<sup>2</sup>

§ 269. **Signature to a demurrer.**—In order to prevent delays by putting in frivolous demurrers, it is required by the rules of court that the demurrer should be signed by counsel.<sup>3</sup> But it is not required to be put in on oath, as it asserts no fact, and relies merely upon matters apparent upon the face of the bill;<sup>4</sup> and it need not be signed by the defendant.<sup>5</sup>

§ 270. **Certificate of counsel.**—In the federal courts a rule provides that “no demurrer or plea shall be allowed to be filed to any bill, unless upon certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay.”<sup>6</sup> It has been held that the complainant cannot treat a plea filed as a nullity and enter an order taking the bill *pro confesso*, where the plea is not sufficiently verified, the proper mode of taking advantage of such a formal defect being by an application for an order setting aside the pleading, or to take it off the files for irregularity.<sup>7</sup> But in a recent case the United States Supreme Court affirmed a decree of the circuit court, entered upon an order *pro confesso* after the filing of a demurrer, declared to be fatally defective in lacking the affidavit of the defendant and certificate of counsel.<sup>8</sup> In Massa-

<sup>1</sup> The usual formulary is that “this defendant, by way of protestation, not confessing all or any of the matters and things in the said complainant’s bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill,” etc. Story’s Equity Pleading (10th ed.), § 455, n.

<sup>2</sup> Taylor v. Holmes, 14 Fed. Rep. 498, 501; Story’s Equity Pleading (10th ed.), § 452; Cooper’s Eq. Pl. 111.

<sup>3</sup> Story’s Equity Pleading (10th ed.), § 461; 1 Daniell’s Ch. Pr. (5th ed.) 591. Where a solicitor has appeared,

a demurrer signed by a solicitor who has not appeared is a nullity. Graham v. Elmore, Harring. Ch. 265. It is customary for the solicitor to sign it as well as the counsel. 1 Barb. Ch. Pr. (2d ed.) 109.

<sup>4</sup> Story’s Equity Pleading (10th ed.), § 461; 1 Daniell’s Ch. Pr. (5th ed.) 591.

<sup>5</sup> 1 Daniell’s Ch. Pr. (5th ed.) 591.

<sup>6</sup> Rule 81.

<sup>7</sup> Ewing v. Blight, 8 Wall. Jr. 124.

<sup>8</sup> Sheffield Furnace Co. v. Witherow (May, 1893), 18 S. Ct. Rep. 936. See, also, Secor v. Singleton, 9 Fed. Rep. 809; § 880 n. 8, *infra*.



chusetts a statement in the nature of a demurrer for want of equity, contained in the answer to a bill, which is permitted by a local rule in chancery, need not be accompanied by a certificate that it is not intended for delay, which the statute requires in the case of demurrers.<sup>1</sup>

**§ 271. Prayer of judgment.**—The demurrer having assigned the cause or causes of demurrer, then proceeds to demand judgment of the court whether the defendant ought to be compelled to put in any further or other answer to the bill, or to such part thereof as is specified as being the subject of demurrer; and concludes with a prayer that the defendant may be dismissed with his reasonable costs in that behalf sustained.<sup>2</sup> If a demurrer is to part of the bill only, the answer (if any) to the remainder usually follows the statement of the causes of demurrer, and the submission to the judgment of the court of the plaintiff's right to call upon the defendant to make further or other answer.<sup>3</sup>

**§ 272. Demurrer on extension of time to answer.**—After a chamber order for further time to answer the defendant cannot put in a demurrer, except on special leave of the court, and if he puts in such a demurrer without leave it will be ordered to be taken off the files for irregularity.<sup>4</sup> But the rule does not apply where extension of time to answer is given by stipulation of the complainant's solicitor, without restriction.<sup>5</sup> If,

<sup>1</sup> "It is not a formal demurrer, and so the statute does not in terms apply. And it is not within the reason of the statute provision, because the time for filing an answer is not extended nor the preparation of the cause for hearing necessarily delayed thereby." *Mill River &c. Ass'n v. Clafin*, 9 Allen, 101.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 582.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 589.

<sup>4</sup> *Burrall v. Raineteaux* (1830), 2 Paige, 331; *Bedell v. Bedell*, 2 Barb. Ch. 99; *Dyson v. Benson*, Cooper, 110; *Cosserat v. Tollett*, 8 Swanst. 683; *Cowman v. Lovett*, 10 Paige, 559. See, however, *Garr v. Ogden*, 4 Edw.

Ch. 625. An order that defendants appear and answer is sufficiently complied with by filing a demurrer. *New Jersey v. New York*, 6 Pet. 323.

<sup>5</sup> *Bedell v. Bedell*, 2 Barb. Ch. 99. "For the party who agrees to extend the time may always prevent the putting in of a demurrer after the time is thus extended, if he wishes to do so, by making it a part of the stipulation that the defendant shall not demur to the bill. And if the defendant, after applying for and accepting such a stipulation, for further time to answer merely, should put in a demurrer to the bill, it would be a matter of course for the court,

however, in the latter case a defendant puts in a demurrer which is clearly frivolous, it will be taken from the files.<sup>1</sup>

§ 273. **Motions to take demurrers off the files.**— An objection that a demurrer was not filed in time should be taken by an application for an order setting it aside or to take it off the files.<sup>2</sup> The same course should be taken for an irregularity in filing a demurrer and answer after an order to plead, answer or demur, not demurring alone.<sup>3</sup> According to strict practice, on a demurrer, if the plaintiff has not an affidavit of service of the order for setting down the demurrer, the demurrer may be struck out of the paper. If an affidavit of service is produced, that authorizes the court, in the absence of the defendant, not to overrule the demurrer, but to hear the plaintiff.<sup>4</sup> When a demurrer is struck out of the paper for want of an appearance, it cannot be again set down without an order which may be granted on petition or motion.<sup>5</sup> The demurrer is not taken off the files by the mere pronouncing of the order, but when the order is drawn up, it is carried to the clerk in court, who withdraws the demurrer, and usually annexes the order to it.<sup>6</sup>

§ 274. **Setting demurrers down for argument.**— Under the former English practice the complainant obtained an order *ex parte*, upon petition, setting the demurrer down for argument, which was served upon the defendant's solicitor at least two days before the hearing.<sup>7</sup> The practice in the United States is subject for the most part to local regulations, and is not absolutely uniform even in the federal courts, although an equity rule provides that if the plaintiff shall not set down a demurrer for argument on the rule-day when the same is

upon a proper application for that purpose, to order the demurrer to be taken off the files." S. O., p. 100.

<sup>1</sup> *Bedell v. Bedell*, 2 Barb. Ch. 99.

<sup>2</sup> *Ewing v. Blight*, 3 Wall. Jr. 134. The application should be for an order "to take a certain paper purporting to be a demurrer" off the files. 1 Daniell's Ch. Pr. (2d ed.) 732.

<sup>3</sup> *Curzon v. De La Zouche*, 1 Swanst. 185. Leave to amend the title of a

joint demurrer and answer has been given on the hearing of a motion to take it off the files for irregularity. *Osborn v. Jullion*, 3 Drew. 552, 554.

<sup>4</sup> *Penfold v. Ramsbottom*, 1 Swanst. 552.

<sup>5</sup> *Tolson v. Lord Fitzwilliam*, 4 Mad. 408.

<sup>6</sup> *Cust v. Boode*, 1 Sim. & Stu. 21.

<sup>7</sup> 1 Daniell's Ch. Pr. (2d ed.) 665, 666.

filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course unless a judge of the court shall allow him further time for the purpose.<sup>1</sup> "No formal order in writing upon the minutes is necessary to set a demurrer down for argument; though that would be a better practice, no doubt, as it would be to set down an equity case for hearing formally, which is rarely done at all. When the case is ready for hearing, or the demurrer or plea is ready to be argued, the parties appear informally in court and proceed with the matter, no attention being paid to a formal entry setting the hearing down in writing on the minutes, order-book or docket."<sup>2</sup> A demurrer to a bill praying for an injunction must be decided before a motion for an injunction can be heard.<sup>3</sup> Where the court permitted a demurrer to be incorporated in an answer, it was held that the demurrer must be brought to a hearing before a trial on the merits.<sup>4</sup> Under the equity rule above quoted the complainant has no right to dismiss his bill after the cause has been decided against him because of his failure to set a plea down for argument.<sup>5</sup> Where some of the defendants filed pleas, and then obtained leave to withdraw them, while other defendants demurred, and it being doubtful whether or not the pleas were before the court, action on the pleas was postponed until the hearing on the demurrer.<sup>6</sup>

**§ 275. Effect of judgment on demurrer.**—A demurrer to a complaint because it does not state sufficient facts to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which,

<sup>1</sup> Equity Rule 88.

<sup>2</sup> Per Hammond, D. J., in *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 773 (West. Dist. of Tenn.). It was there held that where it has been the practice of the court to treat all days in term time as rule-days, the failure of the plaintiff to set down a demurrer for argument on the rule-day when filed or the next rule-day, as provided by Equity Rule 88, is not ground for dismissing the bill.

<sup>3</sup> *Ketchum v. Cargill*, 6 McLean, 13.

<sup>4</sup> *Holt v. Daniels*, 61 Vt. 89, 93. After the court has referred to a master all the issues, both of law and fact, and pending the report, the court cannot hear a demurrer. *Cartee v. Spence*, 24 S. C. 550.

<sup>5</sup> *Chicago &c. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 717.

<sup>6</sup> *Campbell v. Mayor &c.*, 88 Fed. Rep. 795.

when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. If final judgment is entered on the demurrer, it will be a final determination of the rights of the parties, which can be pleaded in bar to another suit for the same cause of action.<sup>1</sup> A decision on demurrer in the cause is the law of the court to be followed upon similar facts until a different rule is laid down by the appellate court.<sup>2</sup> Where a suit is removed to a federal court after a State Supreme Court has passed upon a demurrer filed in the suit, the decision on such demurrer is binding on the federal court.<sup>3</sup>

**§ 276. Overruling a demurrer.**—When a demurrer is overruled, a final decree for the plaintiff is not entered of course, but the defendant, upon proper application, where there is no rule of court upon the subject, may have leave to answer.<sup>4</sup> Where an appeal is taken to the full court from a decree overruling a demurrer, it is in the discretion of the justice making the decree to order the defendant to answer pending such appeal.<sup>5</sup> Under the New Jersey statute regulating the practice in chancery, the defendant, under the usual order to answer after demurrer overruled, cannot file a plea without a special order for that purpose,<sup>6</sup> which will not be granted where it is manifest that the plea, if true in fact, would be no bar to the relief sought by the bill.<sup>7</sup> If an answer is filed with a demurrer and the demurrer is overruled,

<sup>1</sup> *Alley v. Nott*, 111 U. S. (1884), 472.

<sup>2</sup> *Wakelee v. Davis*, 44 Fed. Rep. 582.

<sup>3</sup> *Lookout Mountain Co. v. Houston*, 44 Fed. Rep. 449.

<sup>4</sup> *Forbes v. Tuckerman*, 115 Mass. 115, 119. Under the West Virginia code, on overruling a demurrer the court should not at once decree against the defendant as upon a bill taken as confessed, but should award a rule to answer, which rule, however, need not be served. *Hays v. Heatherly* (West Va.), 15 S. E. Rep. 923. Upon a demurrer to a cross-bill filed without leave, leave may be

granted and the demurrer overruled. *Osborne & Co. v. Barge*, 80 Fed. Rep. 805.

<sup>5</sup> *Forbes v. Tuckerman*, 115 Mass. 115.

<sup>6</sup> *White v. Dummer*, 3 N. J. Eq. 527.

<sup>7</sup> *Seeley v. Price*, 5 N. J. Eq. 231. The chancery act (Rev. N. J., p. 109, sec. 31) provides that if the plea or demurrer filed by a defendant be overruled, no other plea or demurrer shall be thereafter received; but after demurrer overruled it has always been held that it is in the discretion of the court to permit the defendant

no order to answer over is necessary.<sup>1</sup> "The correct practice is not to render a decree directly upon overruling a demurrer; but the order should be that the defendant answer the bill, and if he neglect to do so the complainant may have the bill taken for confessed, and the court will proceed to render a decree as in other cases where bills are taken for confessed."<sup>2</sup> Where a defendant answers over upon the overruling of his demurrer, he waives it except so far as he may have the same advantage in substance on the hearing in case the complainant (upon his whole case, pleadings and proof considered) is not entitled to the relief sought.<sup>3</sup> Where upon demurrer alleging several specific grounds and dismissal of the bill as to some of the defendants, the other defendants are required to answer as to so much of the bill as relates to them, the demurrer is by implication overruled.<sup>4</sup> Where a defendant answers and demurs but takes no testimony in support of his answer, and elects to go to a hearing upon his demurrer, leave will not be granted to open proofs upon overruling the demurrer.<sup>5</sup>

§ 277. The same subject continued.— The overruling of a demurrer to a bill without assigning any reason therefor does not determine finally the sufficiency of the bill, but only that there is sufficient equity upon its face to require an answer.<sup>6</sup> When there is a demurrer to the whole bill and also to part, and the latter is sustained, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matters

to file a plea instead of an answer. *Kirkpatrick v. Corning*, 89 N. J. Eq. 22, 23.

<sup>1</sup> *O'Hare v. Downing*, 180 Mass. 16.

<sup>2</sup> *Miller v. Davidson*, 8 Ill. 518. But it is entirely in the discretion of the court whether the defendant will be ruled to answer after demurrer overruled. *Iglehart v. Miller*, 41 Ill. App. 489. The court may enter a decree against him at once and of course, hear evidence, or refer to the master to take evidence before entering a decree. *Iglehart v. Miller*, 41 Ill. App. 489; *Roach v. Chapin*, 27 Ill. 194; *Wangelin v. Goe*, 50 Ill. 459;

*Miller v. Davidson*, 8 Ill. 518. In *Lambert v. Lambert*, 52 Me. 544, 545, it was said that "In equity the overruling of the demurrer is never followed by a decree making a final disposition of the case; the order is that the party demurring answer further."

<sup>3</sup> *Gordon v. Reynolds*, 114 Ill. 118, 123.

<sup>4</sup> *Mason v. Bair*, 83 Ill. 194.

<sup>5</sup> *Orendorf v. Budlong*, 12 Fed. Rep. 24.

<sup>6</sup> *Battle v. Street*, 85 Tenn. 282; s. c., 2 S. W. Rep. 384.

adjudged to be bad, overrule the demurrer to the residue and direct the defendant to answer thereto.<sup>1</sup> Though a demurrer cannot be good in part and bad in part as to the matter demurred to, it may be good as to one defendant and bad as to another, and therefore may be sustained as to one and overruled as to the rest.<sup>2</sup> Where upon demurrer setting up the statute of limitations the court was in doubt whether the statute applied to such a suit, the demurrer was overruled with liberty to make the same defense by plea or answer.<sup>3</sup> After a demurrer had been overruled the bill was amended and the defendant answered, not taking in his answer the objection which had been raised on the demurrer. It was held that he might at the hearing take the same objection.<sup>4</sup> "If a demurrer is overruled without leave to rely on it in the answer, so far as the question involved in it is concerned it should be treated by the chancellor as settled and the cause heard and decided on the merits as prepared for hearing by the parties; and even where leave has been given to rely on a demurrer in the answer, it is error to act on it on final hearing, the advantage of it being lost and the demurrer waived unless it is disposed of before the cause is heard on the merits."<sup>5</sup> A defendant whose demurrer has been overruled and to whom time has been given to answer may demur again if the complainant in the meantime has amended his bill by joining another person as plaintiff.<sup>6</sup> There have been instances where the court on the argument of a demurrer granted leave to the defendant on overruling it to put in another less extended.<sup>7</sup> But a defendant will only once be permitted to

<sup>1</sup> Powder Co. v. Powder Works, 98 U. S. 126.

<sup>2</sup> Mayor &c. v. Levy, 8 Ves. 398.

<sup>3</sup> Stevens v. Kansas Pac. Ry. Co., 5 Dill. 486.

<sup>4</sup> Johnsson v. Bonhote, L. R. 2 Ch. D. 298.

<sup>5</sup> "When parties after a demurrer is finally overruled have put their cause at issue and gone to the trouble and expense of taking the proof necessary to present the merits of the controversy for determination, they are entitled to have it so determined,"

and such determination submitted to the appellate court for review with all others on demurrer or otherwise which are open to revision on appeal. Boyd v. Sims, 8 Pickle (Tenn.), 771; s. o., 11 S. W. Rep. 948.

<sup>6</sup> Moore v. Armstrong, 9 Porter (Ala.), 697; Bosanquet v. Marsham, 4 Sim. 573. See, also, Robertson v. Lord Londonderry, 5 Sim. 226.

<sup>7</sup> Thorpe v. Macauley, 5 Madd. 218; Barker v. Mellish, 11 Ves. Jr. 68; Metler v. Metler, 18 N. J. Eq. 270, 275, Boon v. Pierpont, 28 N. J. Eq. 7.

delay his answer by plea or demurrer without leave of the court.<sup>1</sup> An order made upon the hearing of a demurrer granting relief upon certain conditions to be fulfilled by plaintiffs, and dismissing the bill in the event of non-compliance, is wholly irregular.<sup>2</sup> When a demurrer to a plea is overruled the judgment is not final, but the court must inquire into and find the facts before making a final decree.<sup>3</sup> A United States rule in equity provides that "if upon the hearing any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can in the judgment of the court be reasonably done; in default whereof the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly."<sup>4</sup>

§ 278. **Overruling a demurrer upon appeal.**—It was said in a recent case in the Supreme Court of Vermont that it was formerly the practice in all cases in which a demurrer to the bill was overruled to remand the case if the defendant asked for it to be proceeded with in the court of chancery in due course; but that for many years the practice has been to regard it as discretionary with the court whether to thus remand or to remand for final decree; and that to induce the court to remand for final decree, and thus deprive the defendant of a trial on the merits if he desires it, the case must be peculiar and exceptional in its circumstances.<sup>5</sup> Ordinarily a decree of the appellate court overruling a demurrer and remanding a cause to be proceeded with is not an adjudication of anything more than that there

See, also, *German Reformed Church v. Von Penchelstein*, 27 N. J. Eq. 30; *Marsh v. Marsh*, 16 N. J. Eq. 392; *Smith v. Taylor*, 82 Cal. 533; s. c., 23 Pac. Rep. 217.

<sup>1</sup> *Rowley v. Eccles*, 1 Sim. & Stu. 511.

<sup>2</sup> *Jones v. Craig*, 127 U. S. 214.

<sup>3</sup> *Warner v. Tomlinson*, 1 Root (Conn., 1790), 201.

<sup>4</sup> Equity Rule 85.

<sup>5</sup> *Stewart v. Flint*, 57 Vt. 216, 217.



is sufficient equity upon the facts of the bill to require an answer.<sup>1</sup>

§ 279. Sustaining a demurrer — Leave to amend.— Formerly upon the allowance of a demurrer to the whole bill the bill was out of court and no subsequent proceedings could be taken in the cause.<sup>2</sup> The rigor of this rule was subsequently relaxed, and the practice is now regulated in most jurisdictions by express provisions in the statutes or rules of the court. A United States equity rule provides that if upon the hearing any demurrer or plea shall be allowed, “the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.”<sup>3</sup> Such amendments are only allowed when they are necessary to promote or attain the ends of justice in the case.<sup>4</sup> If the court sees that the frame of the bill, as it then stands, is not such as entitles the plaintiff to relief as against the demurring party leave to amend will be refused.<sup>5</sup> And where a demurrer going to the merits of the whole bill is sustained for want of equity, an amendment should not be allowed so as to make a new case with new parties.<sup>6</sup>

§ 280. The same subject continued.— Upon an application to amend after the sustaining of a demurrer for defect in substance, the defendant should present the proposed amendments or otherwise apprise the court of what they are, so that the

<sup>1</sup> *Jourolmon v. Massengill*, 86 Tenn. 81, 90; *Battle v. Street*, 85 Tenn. 282.

<sup>2</sup> *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567; *Hays v. Heatherly* (West Va.), 15 S. E. Rep. 223. An order allowing or sustaining a demurrer is not a final decree unless, in terms or effect, it dismisses the bill and puts the case out of court. *Forbes v. Tuckerman*, 115 Mass. 115, 119.

<sup>3</sup> Equity Rule 85.

<sup>4</sup> *Hunt v. Rousmaniere*, 2 Mason, 305; *Dowell v. Applegate*, 8 Fed. Rep. 698, where leave to amend so as to enforce a technical claim against a *bona fide* purchaser was denied, the

plaintiff having also had ample opportunity to bring the matter before the court by proper allegations in the amended bill to which the demurrer was taken.

<sup>5</sup> *Tyler v. Bell*, 2 Myl. & Cr. 89.

<sup>6</sup> *March v. Mayers*, 85 Ill. 177. Under the Code of West Virginia, section 12, chapter 125, amendments are permitted liberally as far as promotive of the ends of substantial justice, and upon overruling a demurrer leave is always given the defendant to file his answer. *Hays v. Heatherly* (West Va.), 15 S. E. Rep. 223; *Bank v. Nelson*, 1 Gratt. 108; *Sutton v. Gatewood*, 6 Munf. 398.

court may intelligently determine the propriety of allowing or disallowing them.<sup>1</sup> It is not the duty of the chancellor, upon sustaining a demurrer to a bill for the reason that the facts upon which the complainant claims relief are not formally and sufficiently pleaded, of his own motion to allow the complainant to amend. If liberty to amend is desired, it should be applied for, otherwise the bill may be dismissed.<sup>2</sup>

<sup>1</sup> *Campbell v. Powers* (Ill. Sup.), 28 N. E. Rep. 1062, affirming s. c., 87 Ill. App. 808, and holding that an order sustaining a demurrer and granting leave to amend may be modified at a subsequent term, since it is not a final order.

<sup>2</sup> *M'Dowell v. Cochrane*, 11 Ill. 81. Where a demurrer to a bill is sustained upon the ground that it is not formally and technically drawn and

the complainant does not apply for leave to amend, the decree should dismiss the bill without prejudice. *Alexander v. Moye*, 38 Miss. 640. On demurrer to one part of a bill, answer and plea to other parts, it is error to sustain the demurrer and dismiss the bill; leave should be granted to amend the bill. *Beauchamp v. Gibbs*, 1 Bibb (Ky.), 481.

## CHAPTER IX.

### DISCLAIMERS.

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| <p>§ 281. Nature of a disclaimer.</p> <p>282. Strict rules of pleading applied to disclaimers.</p> <p>283. Form of a disclaimer.</p> <p>284. Oath and signature.</p> <p>285. Disclaimer at the hearing.</p> <p>286. Answer accompanying disclaimer.</p> <p>287. Disclaimer by one of several defendants.</p> | <p>§ 288. Remedy of defendant disclaiming by mistake.</p> <p>289. Dismissal of defendant upon disclaimer.</p> <p>290. Costs on disclaimer in foreclosure suit.</p> <p>291. Replication, hearing and costs.</p> <p>292. Exceptions for insufficiency — Taking off the file.</p> |
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§ 281. Nature of a disclaimer.— A disclaimer is where the defendant denies that he has or claims any right to the thing in demand by the complainant's bill and renounces all claim thereto.<sup>1</sup> It partakes of the nature of an answer and may be included in the word "answer" in an order of court.<sup>2</sup> If the defendant had an interest but has it no longer he cannot demur, but should come in and disclaim,<sup>3</sup> unless it clearly appears from the bill that he has parted with his interest.<sup>4</sup> A defendant may file a demurrer, plea, answer and disclaimer in the same suit, provided each refers to a separate and distinct part of the bill.<sup>5</sup> If a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.<sup>6</sup> The effect of a disclaimer is not to enlarge the plaintiff's estate, but it merely extends to the matters which are at issue in the suit.<sup>7</sup>

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 706; Story's Equity Pleading (10th ed.), 838; Bentley v. Cowman, 6 Gill & J. (Md.) 152.

<sup>2</sup> Anon., 8 L. J. Ch. 94.

<sup>3</sup> Worthington v. Lee, 2 Bland (Md.), 678, 680; Crane v. Deming, 7 Conn. 887.

<sup>4</sup> Crane v. Deming, 7 Conn. 887. Where a statement in an answer amounts to a disclaimer any further

statement therein not responsive to the bill is irrelevant and impertinent. Saltmarsh v. Hockett, 1 Lea (Tenn.), 215.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 839.

<sup>6</sup> Story's Equity Pleading (10th ed.), § 839; 1 Daniell's Ch. Pr. (5th ed.) 709.

<sup>7</sup> Burrell v. Smith, L. R. 7 Eq. 890, 466.

§ 282. **Strict rules of pleading applied to disclaimers.**—Pleadings in equity are founded in the purest principles of ethics, and especially in a disclaimer evasions and negatives pregnant will not be tolerated.<sup>1</sup> Thus, where creditors sought to reach and subject the real estate of a deceased debtor, alleging that the defendants were heirs, a disclaimer denying to themselves all claim as “the heirs” was deemed open to objection; for it not only left the defendants at liberty to claim as devisees, but if it were literally construed it would be only an averment that they were not all the heirs.<sup>2</sup>

§ 283. **Form of a disclaimer.**—The form of a mere disclaimer is as follows:—The disclaimer of A. B., the defendant, to the bill of complaint of C. D., complainant. This defendant [here follow the words, of course, which precede an answer] saith that he doth not know that he, this defendant, to his knowledge or belief, ever had, or did he claim, or pretend to have, nor doth he now claim, any right, title or interest of, in or to the estates and premises situate, etc., in the said complainant’s bill set forth, or any part thereof; and this defendant doth disclaim all right, title and interest to the said estate and premises in, etc., in the said complainant’s bill mentioned, and every part thereof. [Here follow the words, of course, which conclude an answer.]”<sup>3</sup>

§ 284. **Oath and signature.**—A disclaimer is regarded as in the nature of an answer, and is therefore to be put in under oath, when the defendant is required to answer under oath, but not otherwise.<sup>4</sup> And being designed to operate as a release, it must be signed by the defendant himself, and his signature attested by some person competent to be a witness.<sup>5</sup>

§ 285. **Disclaimer at the hearing.**—Where a person does not disclaim on the record he may do so by his counsel at the bar, in which case the fact should be noticed in the decree.

<sup>1</sup> Bentley v. Cowman, 6 Gill & J. (Md.) 152.

<sup>2</sup> Bentley v. Cowman, 6 Gill & J. 152, 154.

<sup>3</sup> Story’s Equity Pleading (10th ed.), § 844, n.

<sup>4</sup> Dickerson v. Hodges, 48 N. J. Eq. 45, 46. See Ladbroke v. Bleaden, 16 Jur. 629.

<sup>5</sup> Dickerson v. Hodges, 48 N. J.

Upon such a disclaimer he may be dismissed, but without costs; and circumstances may render it expedient to retain him on the record, as, for instance, if he have documents in his possession relating to the suit which ought to be delivered up, in which case the master will be directed to make inquiry.<sup>1</sup> But in proceedings by petition, under a statute, for the appointment of a new trustee, there is some doubt whether a disclaimer at the bar by the original trustee will divest his estate.<sup>2</sup>

**§ 286. Answer accompanying disclaimer.**—A disclaimer can rarely be put in alone. For if the defendant has been made a party by mistake, never having had an interest in the matter in question, yet as he may have had an interest which he afterward parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not;<sup>3</sup> and if such is the fact, an answer may be necessary to enable the complainant to make the proper party, instead of the defendant disclaiming.<sup>4</sup> So an agent charged with personal fraud,<sup>5</sup> or a married woman under the same circumstances, cannot by disclaiming interest avoid answering fully.<sup>6</sup> A party to an account cannot by disclaiming an interest in the account protect himself by such disclaimer from setting out his account.<sup>7</sup> And generally a defendant cannot, by a disclaimer, deprive the plaintiff of the right of requiring a full

<sup>1</sup> *Teed v. Carruthers*, 2 Y. & Coll. 81, 40, 41.

<sup>2</sup> *In re Ellison's Trust*, 2 Jur. (N. S.) 62, where Wood, V. C., said such a disclaimer was not like a disclaimer on a bill, as the latter is entered of record and the former is not. But it was held in *Foster v. Dawber*, 1 Dru. & Sm. 172, a petition under the same statute, that a renouncing trustee could make an effective disclaimer at the bar.

<sup>3</sup> It was said by Alexander, L. C. B., in *Oxenham v. Esdaile*, McL. & Y. 540, that almost every question upon a disclaimer depends upon the particular circumstances of the case.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 706;

*Oxenham v. Esdaile*, McL. & Y. 540. Generally speaking, a mere disclaimer is scarcely to be deemed sufficient or proper, except where the bill simply alleges that the defendant claims an interest in the property in dispute, without more. Story's *Equity Pleading* (10th ed.), § 888a.

<sup>5</sup> *Bulkeley v. Dunbar*, 1 Anst. 87. Or the principal himself. *Bromberg v. Heyer*, 69 Ala. 22.

<sup>6</sup> *Whiting v. Rush*, 2 Y. & Coll. Ex. 546. "Whether her answer may ultimately be made evidence in the cause is another question." Per Alderson, Baron, 8. C. 552.

<sup>7</sup> *Glassington v. Thwaites*, 2 Russ. 458.

answer from him, unless it is evident that the defendant ought not, after such disclaimer, to be retained as a party to the suit.<sup>1</sup> But a party who disclaims and shows he has parted with his interest, and points out to whom he has disposed of it, need not answer further.<sup>2</sup>

**§ 287. Disclaimer by one of several defendants.**—A disclaimer by one defendant cannot in any case be permitted to prejudice the complainant's right as against other defendants.<sup>3</sup> Where a bill is filed against two or more defendants and one disclaims all right and title to the subject in litigation, then at the hearing the bill is simply dismissed as against the disclaiming defendant and the court only determines the rights and interests of the remaining parties. The defendant cannot in that suit maintain a claim against a co-defendant in respect of the matter involved,<sup>4</sup> unless he expressly reserves the right in his disclaimer.<sup>5</sup>

**§ 288. Remedy of defendant disclaiming by mistake.**—Unless the defendant by proper proceedings avoids the effect of his disclaimer, it will operate as a perpetual estoppel.<sup>6</sup> If he puts in a disclaimer, and afterward discovers that he had an interest which he was not apprised of at the time he disclaimed, the court will upon the ground of ignorance or mistake permit him to make his claim.<sup>7</sup> It will not, however, allow a defendant to do so at the hearing; he must, in order to get rid of the effect of his disclaimer, make a distinct application supported by affidavit setting forth the facts in de-

<sup>1</sup> *Isham v. Miller* (1888), 44 N. J. Eq. 61, 68; *Ellsworth v. Curtis*, 10 Paige, 105; *Glassington v. Thwaites*, 2 Russ. 458. See, also, *Worthington v. Lee*, 2 Bland (Md.), 678.

<sup>2</sup> *Spofford v. Manning*, 2 Edw. Ch. 858.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 707; *Williams v. Jones, Younge*, 252, 255. Upon a disclaimer to the whole bill by one defendant the complainant moved that the bill might be dismissed against him with costs to be paid by the complainant, but without prejudice to any question which

should be thereafter raised by the plaintiff as to the mode in which such costs should be ultimately borne. The other defendants were not served with notice of the motion and the order was granted. It was held that the omission of notice was immaterial, as the order could not possibly prejudice any party. *Bailey v. Lambert*, 5 Hare, 178.

<sup>4</sup> *Jolly v. Arbuthnot*, 26 Beav. 288; s. c., 4 De G. & J. 224.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 707.

<sup>6</sup> *Wood v. Taylor*, 8 W. R. 821.

<sup>7</sup> 1 Daniell's Ch. Pr. (5th ed.) 709.

tail on which he founds his claim to such an indulgence;<sup>1</sup> and he must make out a strong case before the court will grant the application.<sup>2</sup>

**§ 289. Dismissal of defendant upon disclaimer.**—The general effect of a disclaimer in cases where it can be properly interposed is to dismiss the bill as to the disclaiming defendant with costs.<sup>3</sup> But “where there is probable cause for making him a party the complainant may not only be excused from paying him costs,<sup>4</sup> but he may pray a decree against the defendant and all claiming under him since the time of filing the bill, and this is usually granted without costs on either side.”<sup>5</sup>

**§ 290. Costs on disclaimer in foreclosure suit.**—The effect of the English authorities relating to costs on disclaimers in foreclosure suits was summarized by Sir John Romilly as follows:<sup>6</sup>—“First, in a suit for foreclosure or redemption of mortgages where a defendant disclaims in such a manner as to show that he never had and never claimed an interest at or after the filing of the bill, then he is entitled to his costs;

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 709; *Sidden v. Lediard*, 1 R. & M. 110.

<sup>2</sup> *Seton v. Slade*, 7 Ves. 265, 267; s. o., 6 Revised Reports, 127.

<sup>3</sup> *Spofford v. Manning*, 2 Edw. Ch. 358, 359; *Isham v. Miller*, 44 N. J. Eq. 61, 62. Where a defendant against whom no relief is prayed, and whose answer under oath has been waived, appears and files a disclaimer, the immediate dismissal of the bill as to him is not reversible error, when no objection is made thereto by either party. *Sawyer v. Campbell* (Ill.), 22 N. E. Rep. 458.

<sup>4</sup> *Spofford v. Manning*, 2 Edw. Ch. 358, 359; *Cash v. Belcher*, 1 Hare, 310, 312. Defendants who, instead of disclaiming, supported the case of the plaintiff, but were ultimately held not entitled to any of the relief accorded to the plaintiff, were left to bear their own costs, irrespective of

the consideration of whether originally they were or were not rightly made parties. *Rackham v. Siddall*, 1 Macn. & G. 607.

<sup>5</sup> *Spofford v. Manning*, 2 Edw. Ch. 350, 360, where it was also said that “some of the old books of practice lay it down that the complainant may have such decree by motion or petition. 1 Jacob's Ch. Pr. 301; 1 Harr. Ch. Pr. 235; while the modern writers evidently consider that the cause may be brought to a hearing upon the disclaimer (no replication being necessary), and if it shall appear that there is good reason for making the disclaiming party a defendant the complainant may have the decree before spoken of against him.”

<sup>6</sup> In *Ford v. Lord Chesterfield*, 16 Beav. 520.



secondly, if a defendant having an interest shows that he disclaimed or offered to disclaim before the institution of the suit, there also he is entitled to his costs; thirdly, where a defendant having an interest allows himself to be made a party to the suit and does not disclaim or offer to disclaim until he puts in his answer or disclaimer, in that case he is not entitled to his costs.”<sup>1</sup>

**§ 291. Replication, hearing and costs.**— Where a defendant puts in a simple disclaimer to the whole bill the complainant ought not to reply to it.<sup>2</sup> But it is otherwise where there is a disclaimer as to part of the bill and a plea or answer to other parts.<sup>3</sup> If one of several defendants answers and disclaims, when the case is in readiness for a hearing as to the other defendants it may at the same time be heard as to him upon the bill and his answer and disclaimer.<sup>4</sup>

<sup>1</sup>Sir John Romilly, M. R., in *Ford v. Chesterfield*, 16 Beav. 520, disapproving *pro tanto* *Gurney v. Jackson*, 1 Sm. & G. 97. See further, as to costs on disclaimers in foreclosure suits, *Silcock v. Roynon*, 2 Y. & Coll. C. C. 376; *Gabriel v. Sturgis*, 5 Hare, 97, 100; *Glover v. Rogers*, 11 Jur. 1000; *Vale v. Merideth*, 18 Jur. 992; *Thompson v. Hudson*, 84 Beav. 107; *Hiorns v. Holtom*, 16 Jur. 1077, 1080; *Teed v. Carruthers*, 2 Y. & Coll. C. C. 31, 41. In *Ohrly v. Jenkins*, 1 De G. & S. 543, it was held that according to the preponderance of modern decisions, where a *puisne* incumbrancer, who is a defendant, disclaims, he is not entitled to costs. *Buchanan v. Greenway*, 11 Beav. 58, to the same point. Where an heir at law of a mortgagor disclaimed and was brought to a hearing, he was held not entitled to costs, as he ought to have offered to execute a proper deed upon being served. *Gray v. Adamson*, 85 Beav. 838. Where a complainant instead of a mere disclaimer put in an answer and disclaimer and appeared for the purpose of claiming costs, he was

not allowed any costs. *Maxwell v. Wightwick*, L. R. 8 Eq. 210.

<sup>2</sup>*Spofford v. Manning*, 2 Edw. Ch. 850; 1 Daniell's Ch. Pr. (5th ed.) 708. Where a defendant disclaimed to the whole bill and the complainant replied and served him with a subpoena to enjoin, the defendant was held entitled to costs for the vexation. *Williams v. Longfellow*, 1 Atk. 582. See, also, *Cash v. Belcher*, 1 Hare, 810, 812.

<sup>3</sup>*Williams v. Longfellow*, 1 Atk. 582; 1 Daniell's Ch. Pr. (5th ed.) 708. A bill was filed in consequence of a claim to a fund made by a defendant. The latter in his answer disclaimed all right to the fund but stated certain facts as the ground for not being ordered to pay the costs of the suit. The complainants entered into evidence by which they falsified those statements. The court held that they were justified in so doing and ordered the defendant to pay the whole costs of the suit, including the costs which the complainant was ordered to pay to the co-defendants. *Deacon v. Deacon*, 7 Sim. 378.

<sup>4</sup>*Spofford v. Manning*, 2 Edw. Ch.

**§ 292. Exceptions for insufficiency — Taking off the file.** Exceptions cannot be filed to a simple disclaimer.<sup>1</sup> The remedy of the complainant who is entitled to an answer in such a case is to move to take the disclaimer off the files.<sup>2</sup> But where the disclaimer is accompanied by an insufficient answer, the proper course appears to be to except to the answer on the ground of insufficiency.<sup>3</sup>

850, 860. If a formal party disclaims by his answer he cannot, unless served with a subpoena to hear judgment, appear at the hearing and have costs of appearing. *Colclough v. Bolger*, 2 Molloy, 455.

<sup>1</sup> *Ellsworth v. Curtis*, 10 Paige, 105. Cf. *Glassington v. Thwaites*, 2 Russ. 458, 468; *Bulkeley v. Dunbar*, 1 Anst. 87; *Graham v. Coape*, 8 Myl. & Cr. 638; s. c., 9 Sim. 96, 108.

<sup>2</sup> *Ellsworth v. Curtis*, 10 Paige, 105. Where complainant sought a judicial declaration that a deed which he had made to the defendant was not what it purported to be, but a mortgage, and the bill alleged that the

defendant still held the title, a disclaimer was ordered to be taken from the files. *Isham v. Miller*, 44 N. J. Eq. 61.

<sup>3</sup> *Ellsworth v. Curtis*, 10 Paige, 105. Where the defendants who attempted to disclaim were charged with having by a false claim prevented the complainant from obtaining a fund in the hands of trustees without the aid of the court of chancery, which charge if proved would have rendered them liable for costs, Lord Cottenham seemed to think it a proper case for a motion to take the answer and disclaimer off the file. *Graham v. Coape*, 8 Myl. & Cr. 642.

## CHAPTER X.

### PLEAS.

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| <p>§ 293. Nature and office of pleas.</p> <p>294. The same subject continued.</p> <p>295. Double pleas without leave.</p> <p>296. The same subject continued.</p> <p>297. Leave to file double pleas.</p> <p>298. Pleas supported by answers.</p> <p>299. Pleas overruled by answers.</p> <p>300. Allowing a plea to stand for an answer.</p> <p>301. Classification of pleas.</p> <p>302. Pleas in abatement.</p> <p>303. Plea of pendency of another suit.</p> <p>304. The same subject continued.</p> <p>305. The same subject continued — Form and proceedings.</p> <p>306. Plea of want of parties.</p> <p>307. Plea of the statute of limitations.</p> <p>308. Plea of the statute of frauds.</p> <p>309. Plea of <i>res adjudicata</i>.</p> <p>310. The same subject continued.</p> <p>311. Pleas of release denying fraud.</p> | <p>§ 312. Pleas of stated account.</p> <p>313. The same subject continued.</p> <p>314. Plea of <i>bona fide</i> purchase.</p> <p>315. Plea of usury.</p> <p>316. Frame of a plea.</p> <p>317. The same subject continued.</p> <p>318. General rules of pleading.</p> <p>319. The same subject continued.</p> <p>320. Amendment of pleas.</p> <p>321. The same subject continued.</p> <p>322. Verification of pleas.</p> <p>323. The same subject continued.</p> <p>324. Proceedings when a plea is filed.</p> <p>325. Setting a plea down for argument.</p> <p>326. Argument of a plea.</p> <p>327. Allowing a plea on argument.</p> <p>328. Overruling a plea on argument.</p> <p>329. Allowing a plea at the hearing.</p> <p>330. Overruling a plea as false.</p> |
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§ 293. Nature and office of pleas.— A proper plea is a defense which reduces the cause or some part of it to a single point, and from thence creates a bar to the suit or to the part of it to which the plea applies.<sup>1</sup> The leading distinction be-

<sup>1</sup> *United States v. American Bell Tel. Co.*, 80 Fed. Rep. 523, 524; *Loud v. Sergeant*, 1 Edw. Ch. 164, 166; *McClaskey v. Barr*, 88 Fed. Rep. 165; *Goodrich v. Pendleton*, 8 Johns. Ch. 384; *Noyes v. Willard*, 1 Woods (C. C.), 187. It is not limited to one fact; it may embrace various facts, but they must all conduce to a single point on which the defendant rests his defense. *Reissner v. Anness*, 8

*Bann. & A.* 148. The proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill, but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going

tween a plea and demurrer is that the former is used as a defense where the defect is not apparent on the face of the bill, while the latter is the proper defense where the defect is apparent on the bill.<sup>1</sup> It is not the province of a plea to interpose defenses which go to the merits and relate in no way to matters in abatement or in bar. Such defenses should properly be raised by answer.<sup>2</sup> But matters in abatement and to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue.<sup>3</sup> A plea may consist of a variety of facts and circumstances. All that is required is that they shall give as their result one clear ground upon which the whole equity of the bill may be disposed of.<sup>4</sup>

§ 294. The same subject continued.—The facts which are pleaded must not be inconsistent with each other.<sup>5</sup> Matters which arise between the bill and defense may be pleaded in analogy to the rule at law.<sup>6</sup> But the remedy where such mat-

into the evidence at large. *Farley v. Kittson*, 120 U. S. 808. A plea must be perfect in itself, so that if true in point of fact it will put an end to the cause. *Allen v. Randolph*, 4 Johns. Ch. 698.

<sup>1</sup> *Cockburn v. Thompson*, 16 Ves. 325; *Black v. Black*, 15 Ga. 445; *Evertson v. Ogden*, 8 Paige, 275. A plea which presents matters proper for demurrer—as multifariousness—will be overruled. *McClaskey v. Barr*, 38 Fed. Rep. 165. The answer is the proper place for denial of all matters of detail tending, if true, to prove the main issue made in the plea. *Greene v. Harris*, 11 R. L. 5, 17. A plea is bad which sets up matters of fact appearing on the face of the bill, and which sets up affirmatively by way of defense a fact which the complainant is required to allege in his bill by an equity rule. *Garrett v. N. Y. Transit &c. Co.*, 29 Fed. Rep. 129.

<sup>2</sup> *Korn v. Wiebusch*, 33 Fed. Rep. 50, holding in an action for the infringement of a patent the question of infringement cannot be determined upon a plea. It must be by answer. *Armengand v. Coudert*, 27 Fed. Rep. 247.

<sup>3</sup> United States Equity Rule 23 is merely affirmative of this general rule. *Livingston v. Story*, 11 Pet. (1887), 352.

<sup>4</sup> *Hazard v. Durant*, 25 Fed. Rep. 26. A plea in order to constitute a bar to the complainant's whole right of action must aver every fact essential to make out a complete defense. *Mount v. Manhattan*, 41 N. J. Eq. 211; *Harrison v. Farrington*, 33 N. J. Eq. 358, 364.

<sup>5</sup> *Story's Equity Pleading* (10th ed.), § 656; *Emmott v. Mitchell*, 14 Sim. 482, 486.

<sup>6</sup> *Payne v. Beech*, 2 Tenn. Ch. 708; *Turner v. Robinson*, 1 Sim. & Stu. 3; *Sergrove v. Mayhew*, 2 Mac. & G.

ters arise after issue is by supplemental or cross-bill.<sup>1</sup> A plea may be bad in part and not in the whole;<sup>2</sup> when it covers too much the court will allow it to stand for the part which it properly covers.<sup>3</sup> A plea that the defendant could not answer without exposing himself to the confiscation of his property was held good as to the discovery, but bad so far as it related to the relief, and the court said the complainant should be allowed to prove its case if it was able to do so without the answer of the defendant.<sup>4</sup> "An answer under oath is evidence in favor of the defendant, because made in obedience to the demand of the bill for a discovery, and therefore only as far as it is responsive to the bill. But a plea which avoids the discovery prayed for is no evidence in the defendant's favor, even when it is under oath and negatives a material averment in the bill."<sup>5</sup> A defendant in a bill of discovery, in aid of an action at law for the recovery of a debt, cannot plead payment of the debt before the commencement of the action at law in bar of the discovery sought by the complainant's bill; for that would transfer the trial of the action at law to the court of chancery, and that, too, without the power of deciding the case in chancery if the plea turned out to be untrue.<sup>6</sup> Where a bill is filed against husband and wife, and the wife refuses to join in an answer or a plea, the husband will be permitted to put in either separately.<sup>7</sup>

**§ 295. Double pleas without leave.**—It is not usual nor in conformity with proper practice for a defendant, without

97; *Lane v. Smith*, 14 Beav. 49; *Jones v. Binns*, 88 Beav. 862; *Campbell v. Joyce*, L. R. 2 Eq. 877.

<sup>1</sup>*Hayne v. Hayne*, 8 Ch. R. 19; *Miller v. Fenton*, 11 Paige, 18; *Johnson v. Fitzhugh*, 8 Barb. Ch. 860; *Payne v. Beech*, 2 Tenn. Ch. 708.

<sup>2</sup>*Kirkpatrick v. White*, 4 Wash. (C. C.) 595, 600.

<sup>3</sup>*Bell v. Woodward*, 42 N. H. 181, 193; *Dormer v. Fortescue*, 2 Atk. 284; *French v. Shotwell*, 20 Johns. 668; s. c., 5 Johns. Ch. 555, where the chancellor said:—"The remedy for such a defect is mild and liberal. It

is only to order the plea to stand for so much of the bill as it properly covers and no more, and to require the defendant to answer to the residue of the bill." In that case the plea in its commencement applied to one part of the bill, yet the conclusion was in express terms to all the relief prayed by the bill.

<sup>4</sup>*United States of America v. McRae*, L. R. 8 Ch. App. 79, 91, 92.

<sup>5</sup>*Farley v. Kittson*, 120 U. S. 808.

<sup>6</sup>*Sperry v. Miller*, 2 Barb. Ch. 682.

<sup>7</sup>*Leavitt v. Cruger*, 1 Paige, 421.

previous special leave of the court, to file several separate pleas, or to present several distinct and independent defenses in one plea. Such pleas are objectionable on the ground of duplicity or multifariousness.<sup>1</sup> Thus a plea in a federal court of another suit pending in a State court for the same cause of action, and that the United States court has no jurisdiction on account of want of diverse citizenship of the parties, is bad.<sup>2</sup> So a plea of the statute of limitations cannot be united with a plea of discharge under an insolvent act,<sup>3</sup> or with a plea of release,<sup>4</sup> or with a plea of an award;<sup>5</sup> or a plea of accord and satisfaction with a plea of title by prescription;<sup>6</sup> or a plea in the nature of an estoppel with a plea alleging a want of legal standing in the complainant to sue.<sup>7</sup>

§ 296. The same subject continued.— Where double pleas are filed to the same matter without leave the proper order is that the pleas may be set down as an answer at the option of defendant, and if he does not chose to do this that ten days be given to him to elect which of the several grounds of defense he will stand on, and when such election is made that

<sup>1</sup> *McClaskey v. Barr*, 38 Fed. Rep. 165; *Benson v. Jones*, 1 Tenn. Ch. 498; *Noyes v. Willard*, 1 Woods, 187; *Sharon v. Hill*, 22 Fed. Rep. 28; *Reissner v. Anness*, 8 Bann. & A. 148; *Didier v. Davison*, 10 Paige, 515; *Rhode Island v. Massachusetts*, 14 Pet. 211; *Langdell's Equity Pleading* (2d ed.), § 98; *Gaines v. Mausseaux*, 1 Woods, 118; *Watkins v. Stone*, 2 Sim. & Stu. 560; *Giant Powder Co. v. Safety Nitro-Powder Co.*, 19 Fed. Rep. 509; *Corporation of London v. Corporation of Liverpool*, 8 Anst. 788; *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, 416, n. 9; s. c., 2 Ves. & B. 154, n. The reason why the court does not admit double pleas is because all the different circumstances may be put together in one answer, which cannot be done at common law. *Saltus v. Tobias*, 7 Johns. Ch. 214; *Didier v. Davison*,

*supra*; *Reissner v. Anness*, 8 Bann. & A. 148.

<sup>2</sup> *Sharon v. Hill*, 22 Fed. Rep. 28.

<sup>3</sup> *Saltus v. Tobias*, 7 Johns. Ch. 214.

<sup>4</sup> *Rhode Island v. Massachusetts*, 14 Pet. 211.

<sup>5</sup> *Rhode Island v. Massachusetts*, 14 Pet. 211.

<sup>6</sup> *Rhode Island v. Massachusetts*, 14 Pet. 211.

<sup>7</sup> *Wooley v. Pemberton* (N. J. Eq.), 10 Atl. Rep. 159. A plea is not rendered double by the mere insertion therein of several averments, which are necessary to exclude collusion arising from allegations which are made in the bill, to anticipate and defeat the bar which might be set up in the plea. *Bogardus v. Trinity Church*, 4 Paige, 178. Nor because the single defense set up consists of a variety of facts and circumstances. *Hazard v. Durant*, 25 Fed. Rep. 26.

the other grounds be overruled.<sup>1</sup> If the complainant replies to a plea instead of setting it down for argument it is a waiver of an objection for duplicity and multifariousness.<sup>2</sup>

§ 297. **Leave to file double pleas.**— When great inconvenience will result to the defendant by compelling him to answer the complainant's bill, the court upon special application and notice,<sup>3</sup> and ordinarily upon the condition that the defendant pay the costs,<sup>4</sup> may permit him to plead several matters in bar;<sup>5</sup> as, for instance, where he could not make his defense by answer without setting out a long account, which would be unnecessary if the defense sought to be made by plea was valid.<sup>6</sup> But the complainant must make out a special case of hardship.<sup>7</sup> And the court will not allow a defendant to plead double upon an affidavit merely showing that he has several defenses of which he might avail himself, if permitted to do so.<sup>8</sup>

§ 298. **Pleas supported by answers.**— A simple denial of an averment of the bill is the province of an answer, not of a plea;<sup>9</sup> and if resorted to by plea the latter constitutes an anomalous plea, or plea not pure, and must be supported by an answer.<sup>10</sup> "If the defense which is set up by a plea has been

<sup>1</sup> *Reissner v. Anness*, 8 Bann. & A. 148; *Noyes v. Willard*, 1 Woods, 187. It was said in *Cook v. Mancius*, 8 Johns. Ch. 427, that although a plea be multifarious, yet if it discloses facts which form a fatal objection to the bill, as the names of necessary parties, it will be suffered to stand, with liberty to the plaintiff to amend his bill by adding the parties on payment of the costs of the plea and subsequent proceedings, but not of the useless matter in the plea.

<sup>2</sup> *Sharon v. Hill*, 22 Fed. Rep. 28.

<sup>3</sup> *Mount v. Manhattan Co.*, 41 N. J. Eq. 211; s. c., 9 Atl. Rep. 114; *Didier v. Davison*, 10 Paige, 515.

<sup>4</sup> *Kay v. Marshall*, 1 Kean, 190, 197; s. c., 8 Cl. & Fin. 245; *Story's Equity Pleading* (10th ed.), § 657, n.; *Noyes v. Willard*, 1 Woods, 187.

<sup>5</sup> *Didier v. Davison*, 10 Paige, 515; *Mount v. Manhattan Co.*, 41 N. J. Eq. 211; s. c., 9 Atl. Rep. 114; *Gibson v. Whitehead*, 4 Madd. 241; *Scott v. Broadwood*, 2 Coll. C. C. 447; *Hardman v. Ellames*, 5 Sim. 640; s. c., 2 Myl. & K. 782.

<sup>6</sup> *Van Hook v. Whitlock*, 8 Paige, 409.

<sup>7</sup> "Such leave will not be readily granted; and if it is granted each defense must be set up by a separate plea." *Langdell's Equity Pleading* (2d ed.), § 98; *Mount v. Manhattan Co.*, 41 N. J. Eq. 211; s. c., 9 Atl. Rep. 114.

<sup>8</sup> *Didier v. Davison*, 10 Paige, 515.

<sup>9</sup> *Bailey v. Le Roy*, 2 Edw. Ch. 514; *Evans v. Harris*, 2 Vea. & B. 361, 364.

<sup>10</sup> *Benson v. Jones*, 1 Tenn. Ch. 498.



anticipated by the bill, and evidence has been charged in disproof of the defense, the defendant must answer charges of evidence notwithstanding his plea, for an answer to that extent will be needed in trying the truth of the plea. The defendant therefore incorporates an answer with his plea; and then the answer is said to support the plea. Such an answer, it will be observed, contains discovery only, and it is called an answer in support of a plea to distinguish it from the case where a defendant *defends* by answer as to part of the bill, and by plea as to part."<sup>1</sup> A plea denying partnership must be accompanied by an answer and discovery as to all the circumstances specially charged as evidence of the partnership.<sup>2</sup>

**§ 299. Pleas overruled by answers.**— A plea that goes to the whole bill and is coupled with an answer not in support of it, but which denies the equities set up in the bill, is overruled by the answer.<sup>3</sup> Where an answer accompanying a plea covers any part of the relief embraced by such plea, it will overrule the plea.<sup>4</sup> If it commences as an answer to the whole bill it overrules a plea or demurrer to any particular part of the bill,

<sup>1</sup> Langdell's Eq. Pl. (2d ed.), § 100. "There is no instance where a plea contains in itself a full defense to the bill that an answer is necessary unless it is rendered so in order to negative some equitable ground stated in the bill for avoiding the effect of the expected bar, as where fraud, combination, facts tending to avoid the force of the statute of frauds or to bring the plaintiff within some of the exceptions of the statute of limitations, as the one or the other of these defenses may be expected; and in these and similar cases the defendant is bound not only to deny those charges in his plea, but to support his plea by an answer also denying them fully and clearly." Washington, J., in *Sims v. Lyle*, 4 Wash. (C. C.) 301. But see *Hilton v. Guyott*, 42 Fed. Rep. 249, 251, where it is said that in modern practice, even though

the bill contains anticipatory averments, no answer in support of the plea is necessary, unless discovery upon interrogatories is called for.

<sup>2</sup> *Everitt v. Watts*, 8 Edw. Ch. 486; *Innes v. Eveans*, 8 Edw. Ch. 454.

<sup>3</sup> *Corlies v. Corlies' Executors*, 28 N. J. Eq. 197. "The general rule is that when the defendant at the same time sets up the same defense both by answer and plea in bar, the former overrules the latter. The reason is, that by interposing the plea he claims that he ought not to be required to answer, and yet at the same time does answer." *Harrison v. Farrington*, 88 N. J. Eq. 358, 361.

<sup>4</sup> *Bangs v. Strong*, 10 Paige, 11; *Grant v. Phoenix Mut. L. Ins. Co.*, 121 U. S. 105; *Bolton v. Gardner*, 3 Paige, 278; *Souzer v. De Meyer*, 2 Paige, 574.

although such part is not in fact answered.<sup>1</sup> But the rule applies only to cases where a defendant *defends* by answer as to part of the bill, and by plea as to part, and not to an answer in *support* of what are termed anomalous pleas.<sup>2</sup> Where complainant, in his bill charging a fraudulent transfer of property, waives defendant's oath to the answer required, a plea in abatement "to the said bill so far as the same makes any charges or seeks any relief against" defendant need not be supported by an answer, as in such case, both pleadings covering the same parts of the bill, the answer would overrule the plea *in toto*.<sup>3</sup> Where plaintiff in an attachment bill charged a fraudulent disposition of defendant's property, and in addition set out fraudulent transfers in support of the charge, defendant, by plea, was allowed to traverse the cause laid for the attachment and by answer deny the other facts alleged, the answer in such case not overruling the plea.<sup>4</sup> A United States equity rule provides that "no demurrer or plea shall be held bad and overruled upon argument, only because the answer may extend to some part of the same matter as may be covered by such demurrer or plea." But it has been adjudged that if the answer extends to the whole of the matter covered by the plea the latter must be overruled.<sup>5</sup>

**§ 300. Allowing a plea to stand for an answer.**—If a plea is bad in form only, but good in substance as to the whole or any part of the relief sought, and was not pleaded in bad faith, it will usually be permitted to stand as a part of the defendant's answer, or the defendant will be permitted to insist upon the same matter in his answer.<sup>6</sup> But a plea which sets up no valid defense to any part of the matter it professes

<sup>1</sup> *Leacraft v. Dempsey*, 4 Paige, 124. *Butchers' Union Live Stock Co.*, 12

<sup>2</sup> See *Langdell's Eq. Pl.* (2d ed.), § 100 *et seq.*, and § 105, where the subject is clearly expounded. *Green*

*v. Harris*, 11 R. L. 5, 85.

<sup>3</sup> *Cheatham v. Pearce* (Tenn.), 15 S. W. Rep. 1080.

<sup>4</sup> *Pigue v. Young*, 85 Tenn. 263.

<sup>5</sup> *Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 105, 115; *Dakin v. Union Pac. Ry. Co.*, 5 Fed. Rep. 665; *Crescent City Live Stock Co. v.*

Fed. Rep. 225.

<sup>6</sup> *Souzer v. De Meyer*, 2 Paige, 574; *Orcutt v. Orms*, 8 Paige, 459; *Jarvis v. Palmer*, 11 Paige, 650; *Bell v. Woodward*, 42 N. H. 193, 196; *Pearse v. Dobinson*, L. R. 1 Eq. 241. See, also, *Rhode Island v. Massachusetts*, 14 Pet. 210. Where one

defense is made by plea and another by an answer accompanying it, the plea may be ordered to stand

to cover should be overruled absolutely, and will not be permitted to stand for an answer.<sup>1</sup> If a plea to the whole bill unaccompanied by an answer is allowed to stand for an answer without reserving to the complainant the right to except, it is to be deemed a full answer, though not necessarily a perfect defense.<sup>2</sup>

**§ 301. Classification of pleas.**—Pleas in equity are pure and not pure, the former consisting of matter *dehors* the bill,<sup>3</sup> the latter of matter either by way of affirmance or denial of matter already in the bill, and must ordinarily be supported by an answer.<sup>4</sup> Pleas not pure are generally termed anomalous pleas and sometimes negative pleas.<sup>5</sup> A plea may be either to the relief or the discovery, or to both, and if it is a good plea to the relief it will be also good to the discovery.<sup>6</sup> Pleas to the relief are either pleas in abatement or pleas in

for an answer. *Lewis v. Baird*, 8 McLean, 56, 62.

<sup>1</sup> *Orcutt v. Orms*, 8 Paige, 459.

<sup>2</sup> *Orcutt v. Orms*, 8 Paige, 459. A plaintiff cannot except to a plea which is ordered to stand for an answer without liberty to except be expressly given. *Kirby v. Taylor*, 6 Johns. Ch. 242. Where a plea which constituted a full defense to a particular part of the bill was disallowed on the ground of a technical defect or informality in the manner of pleading, the court permitted it to stand for an answer; and prohibited the complainant from calling for a further answer, by exceptions, as to that part of the bill, but without precluding him from excepting to the answer to the other parts of the bill, if he so desired. *Leacraft v. Dempsey*, 4 Paige, 124. Allowing a plea to stand for an answer, without any provision in the order that the complainant have liberty to except for insufficiency, in a case where an answer on oath has been waived, is no evidence that the court considered the allegations of the plea as a full

and perfect defense to the suit. *McCormick v. Chamberlain*, 11 Paige, 543. Where a plea is ordered to stand for an answer with liberty to except, or the plea is accompanied by an answer, which will enable the complainant to except without special leave, the master, upon a reference of the exception, must decide as to the sufficiency of the answer considering the plea as a part thereof. *Orcutt v. Orms*, 8 Paige, 459, where it was said that by allowing a plea to stand for an answer the court decides that it contains matter of defense; but that it is not a full defense to all which it professes to cover, or that it is informally pleaded, or that the defense cannot properly be made by way of plea, or that the plea is not properly supported by an answer.

<sup>3</sup> *Benson v. Jones*, 1 Tenn. Ch. 498; *McCloskey v. Barr*, 88 Fed. Rep. 165.

<sup>4</sup> *Benson v. Jones*, 1 Tenn. Ch. 498.

<sup>5</sup> *Story's Equity Pleading* (10th ed.), § 651; *Langdell's Eq. Pl.* (2d ed.) § 101.

<sup>6</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 625.

bar.<sup>1</sup> Under the head of pleas in abatement may be ranged pleas to the jurisdiction, pleas to the person, and pleas to the bill.<sup>2</sup> Pleas to the jurisdiction are that the subject of the suit is not within the jurisdiction of a court of equity; or that some other court of equity has the proper jurisdiction;<sup>3</sup> or that the defendant has not been properly served with process.<sup>4</sup> Pleas to the person are to the person of the plaintiff or to the person of the defendant; of the former some are generally unknown in America, and rarely used in modern times in England. The others are (1) of alienage; (2) of infancy; (3) of coverture; (4) of idiocy or lunacy; (5) of bankruptcy or insolvency; (6) of the want of character in which the plaintiff sues.<sup>5</sup> It is a good plea in abatement that the defendant is not the person he is alleged to be, or that he does not sustain the character he is alleged to bear in the bill.<sup>6</sup> Pleas to the bill are as follows:—(1) Plea of another suit depending in a court of equity for the same matter; (2) plea of want of proper parties; (3) plea of multiplicity of suits; (4) plea of multifariousness.<sup>7</sup> Pleas in bar are divided by Judge Story into three kinds:—(1) Pleas founded on some bar created by statute; (2) pleas founded on matters of record, or as of record, in some court; (3) pleas purely of matter of fact.<sup>8</sup> Pleas of the statute of limitations or of the statute of frauds are illustrations of the first sort. Under the second head are judgments and decrees of courts of record.<sup>9</sup> The principal pleas of matter *in pais* are (1) a plea of release; (2) a plea of a stated account; (3) a plea of a settled account; (4) a plea of an award; (5) a plea of a purchase for a valuable consideration; (6) a plea of title in the defendant.<sup>10</sup> Pleas to bills of

<sup>1</sup> Beames on Pleas, 58.

<sup>2</sup> Beames on Pleas, 58.

<sup>3</sup> Story's Equity Pleading (10th ed.), §§ 710-716.

<sup>4</sup> Foster's Federal Practice, § 126, citing *Larned v. Griffin*, 12 Fed. Rep. 590; *Williams v. Empire Transportation Co.*, 1 N. J. L. J. 815.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 722. Objection to the capacity of a party to sue, as that he is insane, must be made by plea and not by answer. *Hoyt v. Hoyt*, 58 Vt. 588. See, however, § 49, *supra*.

<sup>6</sup> Story's Equity Pleading (10th ed.), § 732.

<sup>7</sup> Story's Equity Pleading (10th ed.), 735. But see § 126, *supra*, as to the objection on the ground of multifariousness.

<sup>8</sup> Story's Equity Pleading (10th ed.), § 749.

<sup>9</sup> Story's Equity Pleading (10th ed.), § 751 *et seq.*

<sup>10</sup> Story's Equity Pleading (10th ed.), § 795.

discovery are (1) pleas to the jurisdiction; (2) pleas to the person; (3) pleas to the bill or frame of the bill; (4) pleas in bar, properly so called.<sup>1</sup>

**§ 302. Pleas in abatement.**—Matter in abatement of the suit, as that there is no such person as the alleged complainant, must be set up by way of plea and not in the answer.<sup>2</sup> An objection that a plaintiff suing and describing himself as an assignee is not legally such must be made by plea and not by demurrer.<sup>3</sup> The defense that the complainant suing as a corporation has no legal existence should be made by plea in abatement; it cannot be pleaded in bar or given in evidence under the general issue.<sup>4</sup> The objection of complainant's bankruptcy should be taken by way of plea, and is waived if not so taken.<sup>5</sup> That the defendant was exempt from service of process is proper matter for plea in abatement.<sup>6</sup> The objection that the defendant was not sued in the proper district, if the facts do not appear on the face of the bill, must be raised by plea in abatement.<sup>7</sup> Whenever a party against whom a cause has been removed from a state court to a fed-

<sup>1</sup> Story's Equity Pleading (10th ed.), § 817. Pleas to the discovery are not often used, a demurrer answering the purpose as well or better. Langdell's Eq. Pl. (2d ed.) § 148.

<sup>2</sup> Chapman v. School District, Deady, 108, 116. An objection that the defendant, a receiver, was sued without leave of the court was not admitted a year and a half after the bill was filed and after the defendant had appeared, answered and cross-examined witnesses. Jerome v. McCarter, 94 U. S. 784. See, also, *In re Young*, 7 Fed. Rep. 855.

<sup>3</sup> Nicholas v. Murray, 5 Sawy. 320.

<sup>4</sup> Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 555. See, also, Conard v. Atlantic Ins. Co., 1 Peters, 450; Kane v. Paul, 14 Peters, 41; Childress v. Emory, 8 Wheat. 642. See § 251, *supra*.

<sup>5</sup> Kittredge v. Claremount Bank, 8 Story, 590. "Where a claim in suit

is one which could be properly proved before a commissioner in bankruptcy, and after the pleadings are closed a discharge has been obtained, it is usual to plead it as a defense at the very next term happening after the last continuance: nor am I aware of any practice to allow it to be pleaded afterwards when long delays have intervened unless a good excuse is given for the delay and on suitable terms." Woodruff, J., in Doggett v. Emerson, Woodb. & M. 196, 210.

<sup>6</sup> Larned v. Griffin, 12 Fed. Rep. 590.

<sup>7</sup> It is not like a case of an entire want of jurisdiction over the person or subject-matter, which may be taken advantage of at any time. Blackburn v. Selma &c. R. Co., 2 Flippin, 525, 532, 534. See, also, Dodge v. Perkins, 4 Mason, 435, 437.

eral court wishes to test any allegation of fact on which such removal was had, he may do so by a dilatory plea in the nature of a plea to the jurisdiction.<sup>1</sup> A plea in abatement of a foreclosure bill, on the ground that the value of the mortgaged property is insufficient to bring the case within the jurisdiction of the court, must allege specifically what this value is, and not merely state that the value of the matter in demand is too small to be within the jurisdiction.<sup>2</sup> By act of congress of March 3, 1875,<sup>3</sup> "if in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."<sup>4</sup>

**§ 303. Plea of pendency of another suit.**—The doctrine is now well settled that an action pending in a foreign jurisdiction cannot be pleaded in abatement to an action commenced in a domestic forum even if there be identity of

<sup>1</sup> McDonald v. Salem Capital Flour Mills Co., 81 Fed. Rep. 577.

<sup>2</sup> Peters v. Goodrich, 8 Conn. 148. It was said in Shattuck v. Cassidy, 8 Edw. Ch. 152, that a valid plea to the jurisdiction must show that some other court has exclusive jurisdiction. A plea to the jurisdiction that one of the parties to the case is a citizen of a State other than that alleged in the petition for removal need not be supported by an answer. McDonald v. Salem Capital Flour Mills Co., 81 Fed. Rep. 577.

<sup>3</sup> 18 St. at L. 470, re-enacted March 3, 1887; 24 St. at L., ch. 872.

<sup>4</sup> Where a plea undertakes to answer the whole bill but extends only to a part, it is bad. Noe v. Noe, 82 N. J. 469; Snow v. Counselman, 186 Ill. 191; Searight v. Payne, 1 Tenn. Ch. 186. But see United States Equity Rule 36. A plea which concludes whether the defendant ought to make answer to matters contained in the bill in any other manner is a plea to the whole bill. Allison v. Sharply, Hard. 98; Bell v. Woodward, 42 N. H. 181, 194.

parties, of subject-matter, and of the relief sought.<sup>1</sup> Doubts have been entertained as to whether the pendency of a suit in a State or federal court in the same district might not be successfully pleaded to the prosecution of a like suit in the other court.<sup>2</sup> But it now seems to be established that it cannot be.<sup>3</sup> The pendency of an action in a State court is good ground for abatement of a second action in a court of the same State between the same parties for the same cause and relief.<sup>4</sup> The pendency of a prior suit will not be a bar to a subsequent suit if the latter embraces more as to parties and subject-matter than the former;<sup>5</sup> but it may justify an order of the court staying the further prosecution of the first suit.<sup>6</sup>

<sup>1</sup> *Radford v. Folsom*, 14 Fed. Rep. 97; *Smith v. Lathrop*, 44 Pa. St. 326; *Bowne v. Joy*, 9 Johns. 221; *Allen v. Watt*, 69 Ill. 655; *Insurance Co. v. Brune*, 96 U. S. 588; *Stanton v. Embrey*, 98 U. S. 548; *Mitchell v. Bunch*, 2 Paige, 606; *McHenry v. Lewis*, 21 Ch. D. 202; s. c., 22 Ch. D. 397; *Peruvian Guano Co. v. Bockwoldt*, 28 Ch. D. 225; *Cole v. Flitcraft*, 47 Md. 312; *SeEVERS v. Clement*, 28 Md. 426; *Grider v. Apperson*, 82 Ark. 882; *Lynch v. Hartford F. Ins. Co.*, 17 Fed. Rep. 627. "That country is undutiful and unfaithful to its citizens which sends them out of its jurisdiction to seek justice elsewhere." *Hatch v. Spofford*, 22 Conn. 485.

<sup>2</sup> See *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. 824; *Andrews v. Smith*, 5 Fed. Rep. 838.

<sup>3</sup> *Dwight v. Central Vt. R. Co.*, 9 Fed. Rep. 785, 789; *Gordon v. Gilfoil*, 99 U. S. 168; *Latham v. Chafee*, 7 Fed. Rep. 520; *Pierce v. Feagans*, 89 Fed. Rep. 587. "The effect of the pendency of another suit for the same cause in another court of the United States has never been expressly de-

cided. See *Wheeler v. McCormick*, 8 Blatchf. 267; *Steiger v. Heidelberg*, 4 Fed. Rep. 455; s. c., 18 Blatchf. 426; *Brooks v. Mills County*, 4 Dill 524, 527. But there seems to be no difference in principle between such a suit and one in a court of another State, except that proceedings in such a case in a federal court could be enjoined by a federal judge. See *Massachusetts Mut. L. Ins. Co. v. Chicago &c. R. Co.*, 13 Fed. Rep. 857; *Beauchamp v. Marquis of Huntley*, Jacobs, 546; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 687." *Foster's Federal Practice* (2d ed.), § 129.

<sup>4</sup> *Radford v. Folsom*, 14 Fed. Rep. 97; *Insurance Co. v. Brune*, 96 U. S. 588, where the statement of Lord Hardwicke in *Foster v. Vassall*, 3 Atk. 587, is quoted approvingly, that "the general rule of courts of equity with regard to pleas is the same as in courts of law but exercised with more liberal discretion."

<sup>5</sup> *Massachusetts Mut. L. Ins. Co. v. Chicago &c. R. Co.*, 13 Fed. Rep. 857. A plea of another suit pending is good only when the first suit is between all the same parties. *Watson v. Jones*, 13 Wall. 679; *Dwight v.*

<sup>6</sup> *Massachusetts Mut. L. Ins. Co. v. Chicago &c. R. Co.*, 13 Fed. Rep. 857; *Hurd v. Moiles*, 28 Fed. Rep. 897.



§ 304. The same subject continued.— A plea of another suit depending for the same cause in bar of a suit in equity can only be of a suit depending in the same or in some other court of equity.<sup>1</sup> The first suit must be for the same purpose as the second and substantially the same relief obtainable.<sup>2</sup> Where suits between the same parties in relation to the same subject-matter are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the others.<sup>3</sup> Where a suit is pending for the same cause in a court of law, all that the defendant can ask is an order putting the complainant to his election whether he will proceed at law or in equity.<sup>4</sup> But the order will not be granted unless the suit at law is for the same cause and the remedy at law is co-extensive and equally beneficial with the remedy in equity.<sup>5</sup> If the pendency of the prior action is alleged in the bill, the court will take notice of it on demurrer, or on motion, and thereupon require the complainant to elect which remedy he will pursue.<sup>6</sup> In other cases the objection of a former suit pending must be taken by plea and not by answer<sup>7</sup> or motion,<sup>8</sup> except when

Central Vt. R. Co., 9 Fed. Rep. 785, 789. And in an infringement suit by A. against B. and C., a plea of pendency of another suit between A. and B., averring that C. is only B.'s agent and servant, does not make B. the sole true defendant, and is bad. *Estes v. Worthington*, 80 Fed. Rep. 465.

<sup>1</sup> *Way v. Bragaw*, 16 N. J. Eq. 214; Story's Equity Pleading (10th ed.), § 742.

<sup>2</sup> *Hurd v. Moiles*, 28 Fed. Rep. 897; *Hertell v. Van Buren*, 8 Edw. Ch. 20; *Watson v. Jones*, 18 Wall. 679.

<sup>3</sup> *Stout v. Lye*, 108 U. S. 66. Upon a plea of another suit pending, the court looks to see whether the bills are substantially for the same cause and for the like object. On the dismissal at the proper stage of the first

bill, the court will allow the second to stand. *American Bible Society v. Hague*, 4 Edw. Ch. 117.

<sup>4</sup> *Way v. Bragaw*, 16 N. J. Eq. 214.

<sup>5</sup> *Way v. Bragaw*, 16 N. J. Eq. 218. See *Tansey v. McDonnell*, 142 Mass. 220.

<sup>6</sup> *Sears v. Carter*, 4 Allen, 339.

<sup>7</sup> *Pierce v. Feagans*, 39 Fed. Rep. 587. "This would seem to follow from the practice, which is not to reply to such a plea nor to set it down for argument, but to refer it on motion at once and of course to a master to ascertain and report whether or not both suits are for the same matter, and if it is found to be true the plea is allowed, and if it is found not to be true it is overruled. Story's Eq. Pl., § 742. But the plaintiff may except to the

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<sup>8</sup> *Murray v. Shadwell*, 17 Ves. 353; See, also, *Hertell v. Van Buren*, 8 disapproving *Anon.*, *Mosely*, 268 Edw. Ch. 20.

two suits are brought in the name of an infant, in which case it is a motion of course to obtain a reference on the statement of counsel that both suits are for the same purpose, to see which of them is most for the infant's benefit and so most proper to be proceeded with.<sup>1</sup>

§ 305. The same subject continued — Form and proceedings.— The pendency of a former suit being pleaded in bar, the defendant may state the pendency and object of the former suit, and aver that the present suit was brought for the same matters; or he may omit the averment that the suits are for the same subject-matter, provided he state facts sufficient to show that they are so.<sup>2</sup> The plea should state that there have been proceedings in the former suit, such as an appearance or process requiring an appearance at least,<sup>3</sup> and that the suit is still pending.<sup>4</sup> The usual course is not to reply to the plea or to have the plea set down and argued, but to refer it to one of the masters to look into the two suits, and to report whether or not they are both for the same matter; if he reports that they are, the plea is allowed; but if he reports that they are not, the plea is then *ipso facto* overruled. If the plaintiff sets down the plea to be argued he admits the truth of the plea, and it must be allowed unless defective in form.<sup>5</sup>

§ 306. Plea of want of parties.— If the defect for want of proper parties is not apparent on the face of the bill, the de-

master's report and bring the matter on to be argued before the court, and if he conceives the plea to be defective in form, or otherwise, independent of the truth of the matter pleaded, he may set down the plea to be argued as in the case of pleas in general. Mitford's Eq. Pl. (Tyler's ed.), 398. But if he sets the plea down to be argued, he admits the truth of it, and it must be allowed if not defective. Story's Eq. Pl. § 748." Battell v. Matot, 58 Vt. 271, 281.

<sup>1</sup> Sullivan v. Sullivan, 2 Mer. 40; Battell v. Matot, 58 Vt. 271, 281.

<sup>2</sup> Davison's Ex'rs v. Johnson, 16 N. J. Eq. 112; McEwen v. Broad-

head, 11 N. J. Eq. 129. The safe course is to make an express averment. Devil v. Brownlow, 2 Dick. 611.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 787; Moore v. Welsh Copper Co., 1 Eq. Abr. 89, pl. 14.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 787, where the learned author deems a positive averment essential.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 748. In New Jersey the complainant may take issue upon the facts of the plea or have a reference to a master to ascertain whether both suits are for the same matter. If he does neither, then the defendant

defendant may plead the matter necessary to show it.<sup>1</sup> Such a plea consists of new matter and is called a pure plea, and need not be supported by an answer.<sup>2</sup> It goes to the whole bill, as well to discovery as to the relief, where relief is prayed.<sup>3</sup> The plea must state the names of the necessary parties if known,<sup>4</sup> setting forth the facts by which they are made necessary.<sup>5</sup> Where a plea of want of parties had been submitted to and the bill amended by adding the required party, a second plea to the amended bill for want of parties was overruled because the defendant was bound to disclose all the proper parties in the first instance.<sup>6</sup> A plea for want of proper parties ought not to be allowed where it appears upon the bill that the parties not joined as defendants are beyond the jurisdiction. The objection should be taken by demurrer specially pointing out the defect.<sup>7</sup>

§ 307. **Plea of the statute of limitations.**—If the objection of the statute of limitations does not appear on the face of the bill it may be taken by way of plea or by way of answer.<sup>8</sup> If the bill does not state any circumstances to take the case out of the statute, such as fraud, etc., the plea may be a pure plea, though otherwise if the bill should charge a fraud which had not been discovered within the period named in the statute. In such case the plea should be accompanied by an answer, answering and denying the circumstances of fraud alleged, in order to avoid the bar.<sup>9</sup> Where the statute is a good defense to only a part of the complainant's demand,

must set the plea down for argument. *McEwan v. Broadhead*, 11 N. J. Eq. 129.

<sup>1</sup> *Howth v. Owens*, 29 Fed. Rep. 722. But see *United States v. Gillespie*, 6 Fed. Rep. 803.

<sup>2</sup> *Goldsmith v. Gilliland*, 24 Fed. Rep. 154.

<sup>3</sup> *Howth v. Owens*, 29 Fed. Rep. 722.

<sup>4</sup> *Dwight v. Central Vt. R. Co.*, 9 Fed. Rep. 785; *Cook v. Mancius*, 8 Johns. Ch. 427.

<sup>5</sup> § 78, n. 1, at page 100. *supra*.

<sup>6</sup> *Rawlins v. Dalton*, 8 Y. & Coll. (Ex.) 447.

<sup>7</sup> *Palmer v. Stevens*, 100 Mass. 461. See, also, *Milligan v. Milledge*, 8 Cranch, 220.

<sup>8</sup> *Conover v. Wright* (1848), 6 N. J. Eq. 618. It may be presented by demurrer when the facts appear on the face of the bill. § 257, *supra*. *Carroll v. Waring*, 8 Gill & J. (Md.) 491, holds that the statute may be set up by plea, though the lapse of time appears on the face of the bill, and that the plea need not be sworn to.

<sup>9</sup> *Conover v. Wright*, 6 N. J. Eq. 618; *Goodrich v. Pendleton*, 8 Johns. Ch. 384.

if pleaded as a bar to the whole the plea will be bad.<sup>1</sup> But a plea of the statute of limitations setting up two matters, either of which establishes that defense, is not for that reason a double plea.<sup>2</sup> It is not necessary that the plea should make express reference to the statute of the State in which the proceeding is instituted. The court will take judicial notice of it.<sup>3</sup> Nor is it necessary in terms to refer to the statute which creates the bar. But it will be sufficient for the defendant to state the necessary facts to bring the case within the operation of the statute, and then insist that by reason of the existence of those facts the complainant's right or remedy is at an end.<sup>4</sup> A plea of the statute which does not negative an averment in the bill that the complainant was under disability, etc., is defective.<sup>5</sup> The defendant need not aver that the case does not fall within any of the exceptions in the statute.<sup>6</sup> It is generally too late to interpose a plea of limitations after the master's report is in, where the point was not taken on demurrer or by answer, though it is within the power of the court, in the furtherance of justice, to allow the plea in an extreme case at any time.<sup>7</sup> It was recently decided in the United States circuit court that on a bill to restrain the infringement of a patent, laches of the complainant could be taken advantage of by plea.<sup>8</sup>

§ 308. **Plea of the statute of frauds.**—Where the bill shows upon its face that the contract which is the subject of the suit was invalid by the operation of the statute of frauds, the defense may be taken by demurrer.<sup>9</sup> And under such circumstances a plea of the statute has been overruled.<sup>10</sup> But where the invalidity of the agreement does not affirmatively appear upon the face of the bill the defendant may plead the

<sup>1</sup> Wood v. Ex'rs of Riker, 1 Paige, 616.

<sup>2</sup> Didier v. Davison, 2 Sandf. Ch. 61.

<sup>3</sup> Harpending v. Reformed Dutch Church, 16 Pet. (1842), 455.

<sup>4</sup> Van Hook v. Whitlock, 7 Paige, 878.

<sup>5</sup> McClaskey v. Barr, 88 Fed. Rep. 165.

<sup>6</sup> Carroll v. Waring, 8 Gill & J. (Md.) 491, 498.

<sup>7</sup> Webb v. Fuller, 88 Me. 405; s. c., 22 Atl. Rep. 884.

<sup>8</sup> Edison Electric Light v. Equitable Life Assurance Co., 55 Fed. Rep. 478, per Coxe, D. J.

<sup>9</sup> See § 260, *supra*.

<sup>10</sup> Black v. Black, 15 Ga. 445.

statute of frauds in bar of the suit.<sup>1</sup> Thus, to a bill for the specific performance of a contract respecting lands, the defendant may plead the statute and by negative averments insist that there has been no contract or agreement in writing signed by the parties.<sup>2</sup> And a plea of the statute was allowed where the bill stated a parol agreement concerning an interest in lands, and alleging a part payment of the purchase-money, such payment not being sufficient to take the case out of the statute.<sup>3</sup> It has been said that if a bill for specific performance of a contract for the sale of land states the agreement generally without specifying whether it was in writing or not, the statute may be set up by plea, but that if the bill states an agreement in writing, a denial of the agreement should be made by answer and not by plea.<sup>4</sup>

**§ 309. Plea of res adjudicata.**—If the judgment of a court of law of ordinary jurisdiction has finally decided the rights of the parties, that judgment may in general be pleaded in bar of a bill in equity founded upon the same cause of action.<sup>5</sup> And a decree of the same or another court of equity may be pleaded with the same effect.<sup>6</sup> A former decree pleaded in bar need not appear to have been between precisely the same parties as those in the suit to which it is pleaded,<sup>7</sup> “for if a

<sup>1</sup> *Cottington v. Fletcher*, 2 Atk. 155.

<sup>2</sup> *Story's Equity Pleading* (10th ed.), § 761; *Cooper's Eq. Pl.* 255.

<sup>3</sup> *Main v. Melbourn*, 4 Ves. 720. See, also, *Brodie v. St. Paul*, 1 Ves. 326; *Jordan v. Sawkins*, 1 Ves. 402; *Parkhurst v. Van Cortland*, 1 Johns. Ch. 278.

<sup>4</sup> *Morison v. Turnour*, 18 Ves. 182. But see *Story's Equity Pleading* (10th ed.), § 762, n. 8, where the soundness of this distinction is questioned. If the bill does not allege the contract in writing, but only in general terms, and a hearing is had before any answer is filed, it is competent for the defendant, where the bill asks a specific performance of a contract for the sale of land, to plead the statute of frauds at the hearing orally. *Lincoln v. Wright*, 5 Jur.

(N. S.) 1142. But as a general rule the statute of frauds must be specially urged, either by formal plea or in the answer, in order to enable the defendant to rely upon it as a defense at the hearing. *Keys v. Astley*, 9 Law T. (N. S.), 356.

<sup>5</sup> *Story's Equity Pleading* (10th ed.), § 780 *et seq.*

<sup>6</sup> *Story's Equity Pleading* (10th ed.), § 790 *et seq.* The objection that a claim was not seasonably offered under an order previously made in the cause limiting the time for presenting claims against a receiver should be made by plea rather than by demurrer. *Central Trust Co. v. Wabash &c. Ry. Co.*, 46 Fed. Rep. 156.

<sup>7</sup> *Matthews v. Roberts*, 2 N. J. Eq. 338.

man institutes a suit and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold,"<sup>1</sup> but it must always appear to have been for the same subject-matter.<sup>2</sup> In order to constitute the former judgment or decree at bar it must appear that the point in issue was judicially determined after a hearing and upon consideration of the merits.<sup>3</sup> A dismissal for want of prosecution is not conclusive in favor of the defendant even upon another suit for the same relief.<sup>4</sup> Where

<sup>1</sup> Mitford's Pleading, ch. 2, § 2, part 2, citing *Moor v. Welsh Copper Co.*, 1 Eq. Cas. Abr. 39. See, also, *Huggins v. York Building Co.*, 2 Atk. 44.

<sup>2</sup> *Matthews v. Roberts*, 2 N. J. Eq. 338. A party may be concluded by the former decree, though he was not named in the proceeding, if his interest was involved in such a form as to have admitted of his contesting the same question which is presented in the second suit. *Taylor v. Cornelius*, 60 Pa. St. 187.

<sup>3</sup> *Keller v. Stolzenbach*, 20 Fed. Rep. 47; *Badger v. Badger*, 1 Cliff. 237, 245; *Haws v. Tiernan*, 53 Pa. St. 192; *Hughes v. U. S.*, 4 Wall. 232; *Gardner v. Raisbeck*, 28 N. J. Eq. 71.

<sup>4</sup> *Carrington v. Holly*, 1 Dick. 280; *Rosse v. Rust*, 4 Johns. Ch. 300; *Badger v. Badger*, 1 Cliff. 237, 245; *Porter v. Vaughn*, 26 Vt. 624. The effect is like that of a nonsuit in an action at law. *American Diamond Rock Boring Co. v. Sheldon*, 17 Blatchf. 208. In *Horner v. Brown*, 16 How. 354, it was held that a judgment of nonsuit entered upon an agreed statement of facts submitted to the court for decision was not a bar to a subsequent suit between the same parties and for the same cause of action. In *Badger v. Badger*, 1 Cliff. 237, 245, Judge Clifford said if the dismissal was not upon the merits of the bill it matters not whether it was

without the consent of the complainant. In *Hughes v. United States*, 4 Wall. 232, Justice Field said: — "If the first suit . . . was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit now; the primary purpose of rules of court being to regulate the practice and promote the dispatch of business, the intention to create an estoppel ought not to be lightly imputed to the rule now under consideration. Such effect, it seems to me, is foreign to the object to be served. True, the rule declares that the plaintiff so in default 'should be deemed to admit the truth and sufficiency' of the plea, but this implied admission is merely for the occasion and to open the way for a decree of dismissal 'as of course,' without trial, hearing or adjudication, a decree which is the equivalent of a judgment of nonsuit at law for want of answer or other default of a like nature." Where a judgment record made a profer in a plea showed that the decree in the former suit was without prejudice to the right of the plaintiffs to bring a new action against all but one of several defendants who joined in the plea, it was held that the plea was bad. *Garrett v. N. Y. Transit &c. Co.*, 29 Fed. Rep. 129.

judgments are pleaded in bar the court may on motion refer the pleas to a master to ascertain the truth of the same, and the questions as to the identity of the parties and of the cause of action may also be included in the reference.<sup>1</sup> But the defendant may have the truth of the plea as to the existence of the record tried under the plea and replication in ordinary course.<sup>2</sup> It is entirely competent for the court, upon the suggestion of the complainant or of its own motion, to require a defendant before the plea is argued to produce a copy of the record relied on by him, of which only a recital, according to the pleader's understanding of it or his construction of it, is set forth in the plea.<sup>3</sup>

§ 310. The same subject continued.— A defense of *res adjudicata*, in suits in equity, must be pleaded, either by special plea in bar or in the answer; appearing neither in bill, plea nor answer, it cannot be relied upon in the evidence.<sup>4</sup> But where the forms of pleading are such that a party has no opportunity to plead a former judgment or decree as an estoppel, the record of the decision in the former suit may be given in evidence with the same conclusiveness as if pleaded.<sup>5</sup> Where a record in bar is pleaded the defendant may be required to show it before the complainant traverses the plea or sets it down for argument; but this practice does not extend to the pleading of a judgment or decree of another court in the bill of complaint.<sup>6</sup> Ordinarily so much of the

<sup>1</sup> *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 1 Fed. Rep. 39; *Tarleton v. Barnes*, 2 Keen, 632, 635; *Wild v. Hobson*, 2 Ves. & B. 110.

<sup>2</sup> *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 1 Fed. Rep. 39.

<sup>3</sup> *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 1 Fed. Rep. 39, 42.

<sup>4</sup> *Turley v. Turley*, 85 Tenn. 251; s. c., 1 S. W. Rep. 891.

<sup>5</sup> *Down v. McMichael*, 6 Paige, 139. Where one sued upon a foreign judgment brings a bill in aid of his defense, setting up the erroneous character of the foreign judgment, and praying discovery to enable him

to establish the facts, the defense that the foreign judgment is conclusive, having been rendered in a court having jurisdiction both of the parties and of the subject-matter, may properly be presented by plea unsupported by an answer, when the jurisdictional facts do not appear in the bill, and when the facts which an answer would tend to prove may be treated as proved in impeachment of the plea, without destroying the defense pleaded. *Hilton v. Guyott*, 42 Fed. Rep. 249.

<sup>6</sup> *Phelps v. Elliott* (1886), 26 Fed. Rep. 881.



former bill and answer must be set forth as is necessary to show that the same point was then in issue.<sup>1</sup> If, however, the pleader files the record upon which he relies as an exhibit to his bill, it will be sufficient.<sup>2</sup>

**§ 311. Plea of release denying fraud.**—Where fraud or other circumstances are charged in the bill, to avoid a release, the defendant pleading the release must, by proper negative averments in his plea, deny the allegations of the fraud, etc., and must support his plea by a full answer and discovery as to every equitable circumstance charged in the bill in avoidance of such release.<sup>3</sup> A plea of release is not bad because it is not stated in the plea, or the answer in support of it, that the release was obtained freely and without fraud, when the bill contains no allegations of fraud.<sup>4</sup> Where the bill charges that a release of the complainant's demand was obtained by fraud and without consideration, it is not sufficient for the defendant merely to plead the release in bar of the suit, although it recites the consideration; but the plea should also contain an averment of the truth of such recital, so that the facts may be put in issue by the replication.<sup>5</sup> The plea of release must set out the consideration upon which it was made, and if the bill be for an account the plea must set out the accounts which form the consideration.<sup>6</sup>

**§ 312. Pleas of stated account.**—Pleas of stated account (where the bill seeks to open and correct) are regulated by the same principles which regulate anomalous pleas generally.<sup>7</sup> To a bill to impeach a decree for fraud the decree itself is pleaded.<sup>8</sup> To a bill to set aside an award the award is pleaded.<sup>9</sup> To a bill alleging circumstances to take an account out of the statute of limitations the statute is pleaded.<sup>10</sup> To a bill alleging that although a release had been given

<sup>1</sup> Story's Equity Pleading, § 791.

<sup>2</sup> *Jourollmon v. Massengill*, 86 Tenn. 81, 86.

<sup>3</sup> *Rolton v. Gardner*, 8 Paige, 273; *Allen v. Randolph*, 4 Johns. Ch. 693.

<sup>4</sup> *McClaine's Adm'r v. Shepherd's Ex'r*, 21 N. J. Eq. 76.

<sup>5</sup> *Fish v. Miller*, 5 Paige, 26.

<sup>6</sup> Story's Equity Pleading (10th ed.), § 797; *Brooks v. Sutton*, L. R. 5 Eq. 381.

<sup>7</sup> *Green v. Harris*, 11 R. L. 5, 29.

<sup>8</sup> *Green v. Harris*, 11 R. L. 5, 29.

<sup>9</sup> *Green v. Harris*, 11 R. L. 5, 29.

<sup>10</sup> *Green v. Harris*, 11 R. L. 5, 29.

there was property not covered by it, and asking for an account, the defendant pleaded a release, and Lord Talbot said it was every day's practice.<sup>1</sup> The books abound with cases of bills filed to open settled accounts for either fraud or error in which the account itself was pleaded in bar with proper averments. The principle is the same in regard to accounts stated but not actually settled.<sup>2</sup> To a bill to set aside a deed, so far as it confirmed a former deed and operated as a release, the deed was pleaded in bar.<sup>3</sup>

§ 313. The same subject continued.— In pleading a stated account in bar to a bill for account, the plea, although neither fraud nor error be charged, must aver that the account is just and true to the best of the pleader's knowledge and belief.<sup>4</sup> It is a fatal objection to such a plea that it does not state explicitly the balance found to be due on the accounting.<sup>5</sup> A defendant may plead or set up in his answer a stated account to a bill for an account generally; and this will be *prima facie* a bar to any further accounting, unless upon a bill charging error or fraud.<sup>6</sup> Where the complainant seeks to impeach and open a stated account on the ground of fraud

<sup>1</sup> Pusey v. Desbourie, 8 P. Wms. 815.

<sup>2</sup> Knight v. Bampfild, 1 Vern. 179; Green v. Harris, 11 R. L. 5, 29.

<sup>3</sup> De Montmorency v. Devereux, 1 Dr. & Wal. 119, 127. The doctrine as to pleas of account stated is so recognized by Chancellor Walworth in Weed v. Smull, 7 Paige, 578. "It is difficult to see how it can be otherwise," said the court in Green v. Harris, 11 R. L. 5, 29, "without changing the whole system regulating what are called anomalous pleas or pleas not pure. The bill claims an account, and, instead of reserving it for a replication, charges that the respondent sets up a pretended stated or settled account as an excuse for not accounting, and then goes on to allege circumstances of fraud or error as reasons why this pretended bar should be set aside or

not avail him. The respondent has in most cases no other defense except to reply in his plea on stated account and to deny the fraud charged." In Cook v. Wilcock, 5 Madd. 828, Sir John Leach said:—"Where the plaintiff in equity seeks to avoid a legal bar upon equitable grounds, there the defendant in equity, pleading the legal bar, must of necessity accompany his plea with averments generally denying the equitable matter; for otherwise there would be no fact to be tried upon his plea, because the bill admits the legal bar." See, also, Foley v. Hill, 8 Myl. & C. 475, 480, 483.

<sup>4</sup> For want of such averment a plea was overruled with leave to amend. Driggs v. Garretson, 25 N. J. Eq. 178.

<sup>5</sup> Harrison v. Farrington, 88 N. J. Eq. 859.

<sup>6</sup> Bullock v. Boyd, 2 Edw. Ch. 298.

or mistake therein, if he not only impeaches the account in his bill, but also charges that he has no counterpart of the account and prays that it may be set forth in the answer, the defendant who pleads the stated account in bar must annex a copy of the account to the answer in support of the plea. But where the complainant by his bill waives an answer on oath, no answer or discovery in support of the plea is necessary, and the defendant in that case may plead the stated account in bar without setting forth a copy thereof.<sup>1</sup> Upon a general bill for an account, if the defendant sets up a stated account in bar, the complainant will not be permitted to show mistakes or errors in such account; but he must amend his bill, as the stated account is *prima facie* a bar until the particular errors in it are assigned.<sup>2</sup> Complainant brought a bill for an account alleging a settlement with the defendant, but that it was induced by defendant's fraud. Defendant filed a plea setting up the settlement in bar and denying the fraud, and also an answer in support of his plea denying the fraud. Having proved the settlement alleged in his plea, it was held that the burden of proving the fraud was upon the complainant.<sup>3</sup>

**§ 314. Plea of bona fide purchase.**—A defendant who claims protection as a *bona fide* purchaser should aver the want of notice fully, positively and precisely, even though it be not charged in the bill, and should deny all knowledge of the facts charged, and from which notice may be inferred.<sup>4</sup>

<sup>1</sup> *Weed v. Smull*, 7 Paige, 578, where it was also held that if the complainant files a general bill for an account without alleging or suggesting that there has been any settlement or statement of accounts between the parties, the defendant may plead an account stated in bar of the suit so far as it seeks an account between the parties without annexing a copy of the account to his plea.

<sup>2</sup> *Weed v. Smull*, 7 Paige, 573. A bill in equity upon a mutual account imports an offer on the part of the plaintiff to pay any balance that may be found due from him to the de-

fendant, and cross-items in such an account in the defendant's favor are not matters of set-off and need not be pleaded to be availed of except when the whole account is set out in the answer. *Goldthwait v. Day*, 149 Mass. 185.

<sup>3</sup> *Farrington v. Harrison*, 44 N. J. Eq. 282.

<sup>4</sup> *Woodruff v. Cook*, 2 Edw. Ch. 259, 264; *Galatian v. Erwin*, Hopk. Ch. 48; *Lowry v. Tew*, 3 Barb. Ch. 408, 414; *Murray v. Ballou*, 1 Johns. Ch. 566; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Harris v. Fly*, 7 Paige, 421. If a defendant relies upon want of notice

A plea that the defendant is a *bona fide* purchaser for a valuable consideration without notice must show to whom the consideration was paid, as well as its actual payment, before receiving notice of the complainant's equities.<sup>1</sup> A plea of *bona fide* purchase without notice for "good and valuable consideration, to wit, a certain sum of money," was overruled because the consideration was not set forth in amount and in traversable form, and so that the court could see that it was adequately valuable if not traversed.<sup>2</sup> Where the bill waives an answer on oath a plea of *bona fide* purchaser need not be accompanied by an answer denying the matter charged by way of notice.<sup>3</sup>

§ 315. Plea of usury.—Usury as a defense must be specially pleaded or set up in the answer to entitle it to consideration,<sup>4</sup> and the plea or answer must distinctly set forth the terms of the usurious agreement.<sup>5</sup> In a suit to foreclose a trust deed an allegation by the defendants that they "did not nor did either of them receive the full sum from said complainants at the time of making said loan, nor at any time, nor did they receive any money at the date of said notes and trust deed, and so these respondents say that the amount

in another from whom he purchased, he must aver the fact in pleading. *Woodruff v. Cook*, 2 Edw. Ch. 259, 264.

<sup>1</sup> *Tompkins v. Ward*, 4 Sandf. Ch. 594. Where a defendant pleads that he is a *bona fide* purchaser of a part of the premises in question, in bar of a bill seeking to set aside a conveyance to his remote grantor on the ground of fraud and breach of trust, and charging that parts or portions of the premises are claimed by such defendant, but without describing them, the plea must aver that he claims no right or title to or in any other portion of the premises except that described in and covered by the plea. *Tompkins v. Anthon*, 4 Sandf. Ch. 97. In the answer in support of a plea of *bona fide* purchase, etc., the defendant must deny every allegation in the bill which, if admitted, would

fix him with notice actual or constructive; but when the facts alleged are not within his personal knowledge he is merely to deny notice thereof; he is not to deny their existence besides, thereby creating unnecessary collateral issues. *Tompkins v. Ward*, 4 Sandf. Ch. 594.

<sup>2</sup> *Secombe v. Campbell*, 18 Blatchf. 108.

<sup>3</sup> *Tompkins v. Anthon*, 4 Sandf. Ch. 97.

<sup>4</sup> *Atlantic & C. R. Co. v. Carolina Nat. Bank*, 19 Wall. 548.

<sup>5</sup> *Vroom v. Ditmar*, 4 Paige, 526; *New Orleans & C. Co. v. Dudley*, 8 Paige, 452; *Luce v. Hinds*, Clarke's Ch. 458; *Crane v. Homeopathic L. Ins. Co.*, 27 N. J. Eq. 484; *New Jersey Patent Tanning Co. v. Turner*, 14 N. J. Eq. 326; *Taylor v. Morris*, 29 N. J. Eq. 606.

claimed by said complainants is largely tainted with usury," is not sufficiently definite as a charge of usury.<sup>1</sup>

**§ 316. Frame of a plea.**— The title of a plea must agree with that of the cause at the time the bill is filed<sup>2</sup> and is headed as follows:— "The plea of the above-named defendant (or, of A. B., one of the above-named defendants) to the bill of complaint of the above-named plaintiff (or plaintiffs)."<sup>3</sup> When put in by more than one defendant the heading runs as follows:— "The joint and several plea of the above-named defendants (or of A. B. and C. D., two of the above-named defendants)."<sup>4</sup> Where it is the plea of a man and his wife the words "and several" should not be inserted, but if introduced the plea is not thereby vitiated.<sup>5</sup> If a female defendant marries subsequently to the filing of the bill, but before pleading, the plea should (unless she has obtained an order to defend the suit by herself) be headed thus:— "The plea of A. B. and C., his wife, lately, and in the bill called C. D., spinster (or widow, as the case may be), to the bill of complaint of the above-named plaintiffs."<sup>6</sup> A plea like a demurrer<sup>7</sup> is usually introduced by a protestation against the confession of the truth of any matter contained in the bill, but this is unnecessary.<sup>8</sup>

**§ 317. The same subject continued.**— When a plea is accompanied by an answer it should be headed "The plea and answer," or "The joint plea and answer," or "The joint and several plea and answer," as the case may be.<sup>9</sup> In practice a plea or demurrer to a part of the bill only usually precedes the answer, which in that case commences thus: "And as to the residue of the said bill this defendant, not waiving his said plea, but relying thereon, and saving and reserving to himself, etc., for answer thereto, or to so much thereof as he

<sup>1</sup> *Goodwin v. Bishop* (Ill.), 34 N. E. Rep. 47.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 681. If the defendant's name is misspelt in the bill the correction should be made in the heading thus:— "The plea of the above-named defendant, John Jones (in the bill by mistake

called William Jones)." Braithwaite's Pr. 44, 62.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 681.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 681.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 681.

<sup>6</sup> 1 Daniell's Ch. Pr. (5th ed.) 682.

<sup>7</sup> See § 268, *supra*.

<sup>8</sup> 1 Daniell's Ch. Pr. (5th ed.) 682.

<sup>9</sup> 1 Daniell's Ch. Pr. (5th ed.) 682.

is advised is material," etc.<sup>1</sup> But there is no objection, except as to the convenience of reference, in permitting the answer to precede a plea to a part of the bill, in which case the pleader must by a reference to the part of the bill which is subsequently covered by the plea, or otherwise, show that it is an answer to the residue of the bill only.<sup>2</sup> Where a plea does not go to the whole bill, it must distinctly set out the part of the discovery or relief intended to be covered by it, either in the words of the bill or by such a description that the court will not be obliged to look into the whole bill to ascertain the part thereof which is covered by the plea.<sup>3</sup> Where a plea to a part of a bill is overruled because it does not distinctly set out the part intended to be covered by it, it should be without prejudice to the defendant's right to insist upon the same matters in his answer, as a defense to the suit *pro tanto*.<sup>4</sup> Other formal requisites of a plea are noticed in succeeding sections.

**§ 318. General rules of pleading.**— A plea must be positive and direct and not merely argumentative, and when a fact is traversed simply by alleging one contradictory thereto the plea must go further and directly negative or traverse the facts inconsistent with the facts alleged.<sup>5</sup> In a plea in bar all the facts necessary to render the plea a complete equitable bar must be clearly and distinctly averred in order that the complainant may take issue upon them.<sup>6</sup> An averment of a conclusion of law is bad pleading.<sup>7</sup> Thus a plea that defendant is "the sole owner in fee-simple" of the property described

<sup>1</sup> *Leacraft v. Dempsey*, 4 Paige, 124, 125.

<sup>2</sup> *Leacraft v. Dempsey* (1833), 4 Paige, 124, 126.

<sup>3</sup> *Jarvis v. Palmer*, 11 Paige, 650; *Van Hook v. Whitlock*, 3 Paige, 409, 418.

<sup>4</sup> *Jarvis v. Palmer*, 11 Paige, 650.

<sup>5</sup> *McDonald v. Salem Capital Flouring Mills Co.*, 31 Fed. Rep. 577. If the defendant has a substantial defense which cannot avail him under his plea, from inaccuracy in pleading, he may claim the full benefit of such

defense by an answer. *Matthews v. Roberts*, 2 N. J. Eq. 388.

<sup>6</sup> *McCloskey v. Barr*, 38 Fed. Rep. 165.

<sup>7</sup> A plea that "complainants were at the time of bringing this suit, and long prior thereto, ousted and dis-seized, and out of possession of said premises," states a mere conclusion of law, and is wholly wanting in proper averments of facts and circumstances to sustain that conclusion. *McCloskey v. Barr*, 38 Fed. Rep. 165.

in the bill, without stating any facts from which the court can see whether defendant is the owner in fee or not, is bad.<sup>1</sup> A plea of a discharge under an insolvent act must state distinctly every fact which was necessary to give the discharging officer jurisdiction in the first instance.<sup>2</sup> In pleading a right acquired under a judgment of an inferior court of limited jurisdiction, sufficient should be stated in the pleading to show that such court had jurisdiction to render the judgment.<sup>3</sup> A plea setting up title to land by virtue of a purchase at sheriff's sale under a writ of *fiery facias* was held defective because it did not set out any order or decree authorizing the issuing of the writ.<sup>4</sup> In setting up a defense under a public statute it is not necessary to set forth the statute in the plea. It is sufficient to state the facts which are necessary to bring the case within the operation of the statute and to insist that upon those facts the plaintiff's right or remedy is at an end.<sup>5</sup> Charges in the bill to support the allegation of fraud must be met in the plea. They may be met by a general denial (no matter how general), provided it be sufficient to put the charges of fraud contained in the bill in issue. It is no ground of objection that the denials are explicit and particular.<sup>6</sup> As to matters which are not alleged to be the defendant's own acts, or to be within his personal knowledge, it is sufficient if the defendant in his negative averments denies the facts charged upon his belief only; but he must so frame his averment that the complainant can put the facts in issue by a replication.<sup>7</sup> Where a deed is set up in a plea it is not sufficient to say it was "executed in due form of law;" delivery and acceptance must also be averred.<sup>8</sup>

§ 319. The same subject continued.— "The proper office of a plea is to bring forward fresh matter not apparent on the face of the bill, and which, if true, is a bar to the complain-

<sup>1</sup> McCloskey v. Barr, 88 Fed. Rep. 165. But the failure to traverse a plea that is bad as alleging matters of law and not of fact is not assignable for error. National Bank v. Life Ins. Co., 104 U. S. 54.

<sup>2</sup> Salters v. Tobias, 8 Paige, 838.

<sup>3</sup> Drix v. Briggs, 9 Paige, 595.

<sup>4</sup> Wealing v. Schress, 88 N. J. Eq. 42.

<sup>5</sup> Bogardus v. Trinity Church, 4 Paige, 178.

<sup>6</sup> Harrison v. Farrington, 88 N. J. Eq. 858, 862.

<sup>7</sup> Bolton v. Gardner, 8 Paige, 278.

<sup>8</sup> Whitlock v. Fiske, 8 Edw. Ch. 181.



ant's action. And a plea which sets forth nothing except what appears on the face of the bill is bad and must be disallowed, although the defendant might have availed himself of the objection by demurrer."<sup>1</sup> But this rule must be understood with the qualification that the plea is not of a purely negative character; for a negative plea may put in issue the very fact asserted in the bill.<sup>2</sup> And "it is also true that a defendant may present a good plea by averring the facts contained in the bill and along with them other and additional facts not contained in the bill, provided that the facts taken from the bill and the new facts together establish a defense."<sup>3</sup>

§ 320. Amendment of pleas.—Where there has been an evident slip or mistake, and the material ground of defense seems to be sufficient, it is customary to grant leave to amend,<sup>4</sup> but "the court always expects to be told precisely what the amendment is to be, and how the slip happened," before it will allow an amendment.<sup>5</sup> And in giving leave to amend, the defendant will be required to exercise the privilege in a very short time.<sup>6</sup>

§ 321. The same subject continued.—There are numerous cases where an amendment has been allowed to a plea supported or accompanied by an answer.<sup>7</sup> "Two general rules

<sup>1</sup> Chancellor Walworth in *Cozine v. Graham*, 2 Paige, 177, 180; *Phelps v. Garrow*, 8 Edw. Ch. 139; *Sperry v. Miller*, 2 Barb. Ch. 682. If the acts constitute a defense the defendant should demur. *Phelps v. Garrow*, 8 Edw. Ch. 139.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 660.

<sup>3</sup> *Missouri Pac. Ry. Co. v. Texas &c. Ry. Co.*, 50 Fed. Rep. 151.

<sup>4</sup> *Pope v. Bish*, 1 Anst. 60; *Freeland v. Johnson*, 2 Anst. 411; *Merrewether v. Mellish*, 18 Ves. 489; *Woods v. Strickland*, 2 Ves. & B. 156. See, also, *Newman v. Wallis*, 2 Bro. Ch. 143, 147. In *Giant Powder Co. v. Safety Nitro Powder Co.*, 19 Fed. Rep. 509, 518, leave to amend a plea

so as to raise a multitude of issues, and after long delay, was denied.

<sup>5</sup> *Newman v. Wallis*, 2 Bro. Ch. 143, 147.

<sup>6</sup> Hoffman's Ch. Pr. (2d ed.) 226; *Nobkissen v. Hastings*, 2 Ves. Jr. 87.

<sup>7</sup> In *Thompson v. Wild*, 5 Madd. 82, a plea of release was supported by an answer. Leave had been given to amend the plea, and besides amending the plea the sworn answer was also amended in some material passages. Sir John Leach said that there was so much inconvenience in allowing any alteration in an answer that he should not as a *general rule* in future give leave to amend a plea supported by an answer. He overruled the plea but let it stand as an

may be traced through all the cases: first, to use great caution in allowing amendments of a sworn answer or other pleading; secondly, to consider whether the plea was so defective in substance that an amendment would be of no use; and even in such cases leave has often been given to withdraw the plea and file a new one. But subject to these considerations courts of equity have always exercised the right to allow amendments of pleas in all cases.”<sup>1</sup>

answer. Afterwards, in *Watkins v. Stone*, 2 Sim. & Stu. 560, he allowed a defendant to withdraw a plea accompanied by an answer and file a new one. In *Davies v. Davies*, 2 Keen, 584, which was a plea of settled accounts accompanied by an answer to the excepted parts denying the fraud, Lord Langdale allowed the plea to be amended. In *Phelps v. Sproule*, 1 Myl. & K. 281, 287, there was a plea of stated accounts and release supported by an answer. The chancellor allowed the plea to be amended. The plea lacked the averment denying the collusion charged in the bill. In *Bayley v. Adams*, 6 Ves. Jr. 586, 598, 599, a case thoroughly discussed, where a plea was supported by an answer, Lord Eldon gave leave to amend the plea, or both plea and answer, as counsel might choose. In *Allen v. Randolph*, 4 Johns. Ch. 693, a release was pleaded without averments denying the fraud charged in the bill. The plea was accompanied by an answer supporting it and denying the fraud. Chancellor Kent allowed it to be amended. In *Leaycraft v. Dempsey*, 4 Paige, 124 (S. C., 15 Wend. 88), there was a plea of stated account with an answer. Chancellor Walworth held the plea defective, but said it would be of course to amend it. But it was allowed to stand for an answer. In *Foley v. Hill*, 8 Myl. & Cr. 475, 488, where a plea was supported by an answer denying part of the

charges, Lord Cottenham held the answer not sufficient, but said if defendant's counsel could effect their object by amending he might permit it. In *Portarlington v. Soulby*, 6 Sim. 856, the vice-chancellor overruled a plea supported by an answer, but allowed the defendant to plead *de novo*, who thereupon put in both plea and answer anew. When these came on, the vice-chancellor again overruled the plea but let it stand for an answer with liberty to except. In *Meeker v. Marsh*, 1 N. J. Eq. 198, which was a plea of stated account supported by an answer, the chancellor allowed both to be amended.

<sup>1</sup>*Green v. Harris*, 11 R. L. 5, 20, where, upon an application to amend a plea, the court said in reply to the contention that its power was absolutely limited by the prescribed rules, which did not allow amendments:— “While the rule does not provide for amending a plea as a matter of right, it would be contrary to all the principles of equity practice to construe it as preventing the court from allowing an amendment in cases where the justice of the case requires it, and it may be presumed the court would not allow it in any other case. Says Mr. Justice Taney in *Rhode Island v. Massachusetts*, 14 Peters, 210, 257:— ‘The court of chancery has always exercised an equitable discretion as to its rules of pleading whenever it has been necessary to do so for the purposes of

§ 322. Verification of pleas.—It is a general rule that where a defendant pleads matter of fact not stated in the bill, and only sustainable by proof other than that of a record or some public testimonial,<sup>1</sup> he must make oath to the truth

justice.' The forty-ninth New York chancery rule provided that if a plea be overruled no other plea should be received. But it was laid down that this did not prevent the court from allowing another plea on special grounds. 1 Hoffman's Ch. Pr. 226. So, also, in the English chancery. *Rowley v. Eccles*, 1 Sim. & Stu. 511. In *In re Lyons*, 1 Dr. & Wal. 827, Lord Chancellor Plunkett said:—'Rules ought to be enforced against a party who undertakes to act in opposition to them without an application to the court in the first instance. Yet there is no ground for saying, nor can it be pretended, that these rules, the creatures of the court, are to become its masters by assuming a nature so binding as to overrule and control the acts of that very court which gave them existence.' And in *Dicas v. Lord Brougham*, 6 C. & P. 249, which was a suit against Lord Brougham in consequence of an order made by him in a case in chancery, Lord Lyndhurst, C. B., said that the chancellor had the authority to make an order in a particular case altering the practice. So, also, in *Burrell v. Nicholson*, 6 Sim. 212, Shadwell, V. C., said:—'The orders of the court are to be considered as laying down general rules, but not as being so imperative that they can under no circumstances be departed from.' And also Lord Chancellor Cottenham in *Smith v. Webster*, 3 Myl. & Cr. 244. And the ordinances of Lord Bacon, A. D. 1618 (No. 44), evidently contemplate the making of an order upon the special nature of the case against the general rules whenever

necessary." After an amendment of the final decision of the chancellor upon the merits it was held proper to refuse to permit pleas to be amended so as to meet objections which were raised at the hearing two months before the decision was rendered, especially where such amendment would not affect the grounds on which the decision was based. *Claffin v. Bennett*, 51 Fed. Rep. 698.

<sup>1</sup> "If the plea relies upon any public record or other matter of which the court must take notice, or which may be shown by a record, as upon a former decree in relation to the same matter in bar, then if the decree be enrolled according to the English mode the defendant may make profert of the record without swearing to the plea, because to the verity of the record there can be no addition by the defendant's oath; but if the decree be in paper only, so that it cannot be shown to the court, then the plea must be on oath. A plea resting upon a statute alone is a plea of matter of record; but if it be necessary to couple any mere matter of fact with a statute in order to constitute a complete defense, then the plea must be on oath, because the defense would be unavailable without an averment of such fact. *Wall v. Stubbs*, 2 Ves. & B. 354, 357. . . . Where the lapse of time appears upon the face of the bill without any allegation of an acknowledgment, payment or other circumstance which can take the case out of the statute, the defendant may take advantage of the statute either by a plea or by a demurrer;

of the facts he so advances as a defense.<sup>1</sup> It has been held that a plea must be verified by oath although the complainant has expressly waived an answer from the defendant on oath.<sup>2</sup> A verification conforming to a statute which requires an affidavit that the plea is not interposed for delay, but in good faith, is sufficient although the defendant does not make oath that the matter is true.<sup>3</sup> It was held in Tennessee that a plea in abatement may be sworn to by an attorney or agent of the defendant if the facts constituting the foundation of the plea be within his personal knowledge.<sup>4</sup>

and such plea or demurrer need not be sworn to, because the oath of the defendant cannot be required to verify facts which the complainant himself has stated to be true." *Carroll v. Waring*, 8 Gill & J. (Md.) 491.

<sup>1</sup> *Carroll v. Waring*, 8 Gill & J. (Md.) 491; *Dunn v. Keezin*, 8 Scam. (Ill.) 297; *Heartt v. Corning*, 8 Paige, 566; *Bassett v. Company*, 48 N. H. 251. United States Equity Rule 81 provides that "no demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact."

<sup>2</sup> *Heartt v. Corning*, 8 Paige, 566; *Bassett v. Company*, 48 N. H. 251.

<sup>3</sup> "The old rule on the subject was that to a plea of matter *in pais* in bar the defendant must make oath that it is true. And it has been held that such oath is requisite even though the bill pray an answer without oath. *Heartt v. Corning*, 8 Paige, 566. But where the statute directs what the verification of the plea shall be, it must be assumed that no further or other verification is necessary." *Harrison v. Farrington*, 88 N. J. Eq. 359, 360.

<sup>4</sup> *Bank v. Jones*, 1 Swan, 891. See,

also, *Carter v. Vaulx*, 2 Swan, 641; *Bank v. Anderson*, 8 Sneed, 672; *Carlisle v. Cowan*, 85 Tenn. 170; *Klepper v. Powell*, 6 Heisk. 508. In the case last cited it was held that it was not necessary that the fact of agency should be stated in the affidavit, and that the essential requirement is that the truth of the plea should be verified by some one who is willing to swear that it is true. But an affidavit by a third person, who does not purport to be either the agent or attorney of the defendant, that he is "informed and believes that the plea is true," etc., is not sufficient. *Bank v. Jones*, *supra*. See, however, as to the sufficiency of an oath upon information and belief, *Ewing v. Blight*, 8 Wall. Jr. 184; *Heartt v. Corning*, 8 Paige, 566. An affidavit that the facts in the plea are true "in substance and in fact" complies with a rule that the affidavit must be positive in form, *Wrompelmeir v. Moses*, 8 Baxt. (Tenn.) 470; *Trabue v. Higden*, 4 Cold. (Tenn.) 622, 623; *Bank v. Jones*, 1 Swan (Tenn.), 392; *Seifreid v. Bank*, 2 Tenn. Ch. 18, especially where the party furthermore swears that he is acquainted with the facts. *Cheatham v. Pearce* (Tenn.), 15 S. W. Rep. 1080, 1082. A plea need not be verified before the court where the suit is pending. It may be sworn to before

§ 323. The same subject continued.—Where a plea is not sufficiently verified the proper mode of taking advantage of the defect is by an application, upon motion and notice,<sup>1</sup> for an order setting aside the plea, or to take it off the files for irregularity.<sup>2</sup> The objection cannot be made upon the argument of the plea,<sup>3</sup> nor upon the hearing.<sup>4</sup> The affidavit may be amended by leave of the court.<sup>5</sup>

§ 324. Proceedings when a plea is filed.—A party does not take notice of the filing of a plea or demurrer unless notice thereof be entered in the order book as prescribed by a rule of the court.<sup>6</sup> As a general rule neither party can take a step in the cause until the plea is disposed of.<sup>7</sup> And, if a defendant pleads only to part of the bill and answers to the residue, the plaintiff cannot except to the answer until the plea has been argued,<sup>8</sup> or if he does so the truth of the plea is

any officer in the State authorized to administer oaths, *Carlisle v. Cowan*, 85 Tenn. 170; s. c., 2 S. W. Rep. 26, and where the defendant is a non-resident, there is no objection to a verification before any officer of another State who would be authorized by the laws of the forum to administer oaths in legal proceedings. *Cheatham v. Pearce* (Tenn.), 15 S. W. Rep. 1080. In *Toledo Tie & Lumber Co. v. Thomas*, 88 West Va. 566; s. c., 11 S. E. Rep. 87, where the same matter in abatement was presented by both plea and answer, the latter alone being sworn to, the matter was treated as properly pleaded.

<sup>1</sup> *Harrison v. Farrington*, 88 N. J. Eq. 858, 860; *Wild v. Gladstone*, 8 De G. & S. 740; s. c., 15 Jur. 718.

<sup>2</sup> *Ewing v. Blight*, 8 Wall. Jr. 134; *Heartt v. Corning*, 8 Paige, 566; *Wild v. Gladstone*, 8 De G. & S. 740; s. c., 15 Jur. 718. See, however, *National Bank v. Insurance Co.* 104 U. S. 54, where it was said that a plea lacking the requisite certificate and affidavit may be *disregarded*.

<sup>3</sup> *Goodyear v. Toby*, 6 Blatchf. 180;

*Heartt v. Corning*, 8 Paige, 566; *Bassett v. Company*, 48 N. H. 251. But see *Wall v. Stubbs*, 2 Ves. & B. 854, 858; § 880 n. 8, *infra*.

<sup>4</sup> *Harrison v. Farrington*, 88 N. J. Eq. 858, 860.

<sup>5</sup> *Cheatham v. Pierce* (Tenn.), 15 S. W. Rep. 1080; *Wrompelmair v. Moses*, 8 Baxt. (Tenn.) 471; *Trabue v. Higden*, 4 Cold. (Tenn.) 624; *Seifreid v. Bank*, 2 Tenn. Ch. 19.

<sup>6</sup> *Newby v. Oregon Cent. R. Co.*, 1 Sawy. 68, which was an unsuccessful motion to dismiss because of plaintiff's failure to reply or set down the plea for argument, the same not having been entered on the order book.

<sup>7</sup> 1 Daniell's Ch. Pr. (5th ed.) 691. See, also, *Buchanan v. Hodgson*, 11 Beav. 868. The defendant cannot, in the meanwhile, obtain an order that the plaintiff make his election. *Anon*, *Moseley*, 304; *Vaughan v. Welsh*, *Moseley*, 210; *Fisher v. Mee*, 8 Mer. 45, 47.

<sup>8</sup> 1 Daniell's Ch. Pr. (5th ed.) 691. Unless in cases where the pleas are confined to the relief and the defendant undertakes to answer to the

admitted.<sup>1</sup> And though by amending a bill in equity the complainant may have tacitly admitted the plea of defendant theretofore filed, the amended bill, standing in the place of a new one, is not answered by that plea, and if defendant then demurs, the case stands as if no plea had been filed.<sup>2</sup> The court will not grant an injunction nor appoint a receiver pending a plea to its jurisdiction.<sup>3</sup> Where some defendants filed pleas and then obtained leave to withdraw them, while other defendants demurred, it being doubtful whether or not the pleas were before the court, it was held to be the better practice to postpone action on the pleas until the hearing on the demurrer.<sup>4</sup> The filing of a plea is a compliance with a rule to answer.<sup>5</sup> A plaintiff has been permitted to file a demurrer to a plea, but the practice is contrary to general usage.<sup>6</sup>

**§ 325. Setting a plea down for argument.**—“If the plaintiff conceives a plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency. And if the defendant is anxious to have the point determined he may also take the same proceeding.”<sup>7</sup> A motion to strike out an insufficient plea is not correct practice. The plea should be set down for argument.<sup>8</sup> The manner of setting a plea down for argument is regulated by local rules. In the United States courts a rule provides that if the plaintiff fail

whole discovery sought. *Pigot v. Stace*, 2 Dick. 496; *Sidney v. Perry*, 2 Dick. 602.

<sup>1</sup> *Brownell v. Curtis*, 10 Paige, 210.

<sup>2</sup> *Tompkins v. Hollister*, 60 Mich. 470; s. c., 27 N. W. Rep. 651.

<sup>3</sup> *Ewing v. Blight*, 3 Wall. Jr. 139, where it was said, however, that “If any irremediable mischief should impend, which it is absolutely necessary to meet with promptness, or if there be any just suspicion that the plea or demurrer is merely intended for delay, the court will order an immediate hearing or trial of the plea.”

<sup>4</sup> *Campbell v. Mayor*, 88 Fed. Rep. 795.

<sup>5</sup> *Bracken v. Kennedy*, 8 Scam. 564;

*Kay v. Marshall*, 1 Keen, 190; *Jones v. Earl of Stafford*, 3 P. Wms. 79, 81; *Roberts v. Hartley*, 1 Bro. C. C. 56; *De Minckwitz v. Udney*, 16 Ves. 355; *Phillips v. Gibbons*, 1 Ves. & B. 184; *Newman v. White*, 16 Beav. 4; *Heartt v. Corning*, 8 Paige, 566.

<sup>6</sup> *Beard v. Bowler*, 2 Bond, 18; *Goodyear v. Toby*, 6 Blatchf. 130. See, also, *Witt v. Ellis*, 2 Cold. (Tenn.) 40; *Klepper v. Powell*, 6 Heisk. (Tenn.) 506.

<sup>7</sup> *Mitford's Pl.*, ch. 2, § 2, part 2.

<sup>8</sup> *Corlies v. Corlies' Executor* (1872), 23 N. J. Eq. 197. But the court in the exercise of its discretion considered the motion as if the plea were set down for argument and overruled it.



to set down any plea or demurrer for argument on the rule-day when the same is filed or on the next succeeding rule-day, he is deemed to admit the sufficiency thereof, and his bill is dismissed as of course, unless a judge of the court allows him further time for the purpose.<sup>1</sup> It was held that the failure of the plaintiff to comply with the rule in a case pending in a circuit where it had been the practice to treat all days in term time as rule-days was not sufficient ground for dismissing the bill.<sup>2</sup> In the case cited Judge Hammond said:—"No formal order in writing upon the minutes is necessary to set the plea down for argument, though that would be a better practice, no doubt, as it would be to set an equity case down for hearing formally, which is rarely done at all. When the case is ready for hearing, or the demurrer or plea is ready to be argued, the parties appear informally in court, and proceed with the matter, no attention being paid to a formal entry setting the hearing in writing on the minutes, order book or docket."<sup>3</sup> No one except the party who files the plea can take advantage of the failure of the plaintiff to act upon it.<sup>4</sup>

§ 326. **Argument of a plea.**—Where a plea is set down for argument without any replication no objection can be taken to its form or regularity. Such objection can only be made by exceptions.<sup>5</sup> But the sufficiency of the bill as to substance is tested, although its allegations are not taken so strictly against the complainant as in case of a demurrer.<sup>6</sup> By setting the plea down for argument the complainant tests its sufficiency and in effect demurs to it.<sup>7</sup> Every fact stated in the bill and not denied by the averments in the plea and by the answer in support of the plea must be taken as true.<sup>8</sup> Where

<sup>1</sup> Equity Rule 38.

<sup>6</sup> *Rumbold v. Forteath*, 2 Jur. (N. S.)

<sup>2</sup> *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 778.

686.

<sup>3</sup> *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 778.

<sup>7</sup> *Korn v. Wiebusch*, 83 Fed. Rep. 50, 51; *Burrell v. Hackley*, 85 Fed. Rep. 888; *Davison v. Johnson*, 16 N. J. Eq. 112; *Hilton v. Guyott*, 42 Fed. Rep. 249, 251; *Flagg v. Bonnell*, 10 N. J. Eq. 82.

<sup>4</sup> *Chicago &c. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 717.

<sup>5</sup> *Kellner v. Mut. L. Ins. Co.*, 43 Fed. Rep. 623; *Davison v. Johnson*, 16 N. J. Eq. 112. See, also, *Armengaud v. Coudert*, 27 Fed. Rep. 247.

<sup>8</sup> *Bogardus v. Trinity Church*, 4 Paige, 178; *McCloskey v. Barr*, 88 Fed. Rep. 165.



the complainant files no replication to the defendant's plea, but sets it down for argument, the truth of all facts stated in the plea and well pleaded is admitted,<sup>1</sup> however inconsistent with or contradictory of the allegations of the bill and the statements and recitals in the returns.<sup>2</sup> Where a plea requires an answer to support it, upon argument of the plea the answer may be read to counterprove the plea;<sup>3</sup> and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled or ordered to stand for an answer only.<sup>4</sup> If a plea accompanied by an answer is allowed, the answer may be read at the hearing of the cause to counterprove the plea.<sup>5</sup> A plea upon argument may be either allowed simply or with leave to amend, or the benefit of it may be saved to the hearing,<sup>6</sup> or it may be ordered to stand for an answer,<sup>7</sup> or it may be overruled.<sup>8</sup>

**§ 327. Allowing a plea on argument.**—If a plea is allowed simply, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded with the averments necessary to support it be true.<sup>9</sup> Where a plea is allowed upon argument, or the plaintiff without argument thinks it, though good in form and substance, not true in point of fact, he may take issue upon it and proceed to disprove the facts upon which it is endeavored to be supported.<sup>10</sup> This he does by filing a replication in the same manner that he would do if the defendant had simply put in an answer to the bill in the usual way.<sup>11</sup> Where a defendant files a plea

<sup>1</sup> *Kellner v. Mut. L. Ins. Co.*, 48 Fed. Rep. 628; *Gallagher v. Roberts*, 1 Wash. (C. C.) 320; *Rowley v. Williams*, 5 Wis. 151; *Davison v. Johnson*, 16 N. J. Eq. 112.

<sup>2</sup> *United States v. American Bell Tel. Co.*, 29 Fed. Rep. 17, case of a plea in abatement.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), §§ 690, 699; *Bogardus v. Trinity Church*, 4 Paige, 178; 1 *Daniell's Ch. Pr.* (5th ed.) 694.

<sup>4</sup> *Story's Equity Pleading* (10th ed.), § 699; *Hildyard v. Cressy*, 8 Atk. 303.

<sup>5</sup> *Souzer v. De Meyer*, 2 Paige, 574;

*Bogardus v. Trinity Church*, 4 Paige, 178.

<sup>6</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 699.

<sup>7</sup> See § 300, *supra*.

<sup>8</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 695.

<sup>9</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 696; *Bassett v. Company*, 43 N. H. 258.

<sup>10</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 696; *McEwen v. Broadhead*, 11 N. J. Eq. 129; *United States v. Dalles Military Road Co.*, 140 U. S. 599, 617.

<sup>11</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 697; *McEwen v. Broadhead*, 11 N. J. Eq. 129; *United States v. Dalles Military Road Co.*, 140 U. S. 599, 617, where it

which goes to the whole equity of the bill, and a motion is afterwards made in the cause which confesses the truth of the plea, the court may deal with the cause as though an order had been made allowing the plea.<sup>1</sup> "The rule seems to be settled that the allowance of a plea, which either constitutes a full defense to the complainant's whole case or deprives him of all power to further prosecute his action, will, if he holds an injunction, entitle the defendant to its dissolution. The allowance of the plea will not *ipso facto* dissolve the injunction, but a dissolution will be granted as of course on motion."<sup>2</sup> Upon the allowance of a plea to the whole bill the case is not out of court until a subsequent order has been obtained dismissing it.<sup>3</sup>

**§ 328. Overruling a plea on argument.**—The effect of overruling a plea is to impose upon the defendant the necessity of making a new defense. This he may do either by a new plea<sup>4</sup> or by an answer, and the proceedings upon the new defense will be the same as if it had been originally made.<sup>5</sup> The defendant may have leave to amend upon the overruling of his plea,<sup>6</sup> and where the complainant amends his bill after a plea to the same has been disallowed, the de-

was held that rule 83 of the rules of practice in equity, that the plaintiff may set down a plea to be argued or may take issue upon it, does not mean that the plaintiff is to make thereby such a conclusive election that if he sets down the plea to be argued and it is sustained on the argument he cannot afterwards take issue on it.

<sup>1</sup> *Fulton v. Gracen*, 44 N. J. Eq. 448.

<sup>2</sup> *Fulton v. Gracen*, 44 N. J. Eq. 448, 446. "If the defendant interposes a plea in bar to the whole bill and the complainant does not reply to it, but is disposed to question its validity, instead of the complainant's demurring to it the defendant must set it down for argument, and this answers to the demurrer at law. If the plea should be decided not to be good, the defendant must answer the bill. If it is sustained, the complainant must

reply to it. When he does reply and takes issue, the determination of that issue is final. The practice is well settled and the decisions are uniform." *Flagg v. Bonnel*, 10 N. J. Eq. 82.

<sup>3</sup> *Tarleton v. Barnea*, 2 Keen, 632, which was a case of a plea of *lis pendens* allowed upon reference to a master.

<sup>4</sup> By leave of the court, but not otherwise. *McKewan v. Sanderson*, L. R. 16 Eq. 816; *Chadwick v. Broadwood*, 8 Beav. 816; *Wheeler v. McCormick*, 8 Blatchf. 267; *Lamb v. Starr*, Deady, 850.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 701, 702.

<sup>6</sup> *Sanders v. King*, 6 Madd. 61; *Loving v. Fairchild*, 1 McLean, 338. See, also, U. S. R. S., § 954.

fendant may put in a new plea to the amended bill.<sup>1</sup> Where a plea with an accompanying answer is overruled, and the defendant ordered to put in a full and perfect answer, he is not allowed to repeat in his second answer the same matter contained in the plea which has been overruled.<sup>2</sup> Where the complainant sues *in forma pauperis*, the costs upon overruling the defendant's plea, on the ground of its informality, are not to be paid to the complainant if the defendant finally succeeds in his defense.<sup>3</sup> A United States equity rule provides that "if upon the hearing any plea is overruled the plaintiff is entitled to his costs in the cause up to that period unless the court is satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea the defendant is assigned to answer the bill, or so much thereof as is covered by the plea, the next succeeding rule-day, or at such other period as, consistently with justice and the right of the defendant, the same can in the judgment of the court be reasonably done; in default whereof the bill is taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly."<sup>4</sup>

§ 329. **Allowing a plea at the hearing.**—"If a plea in the apprehension of the complainant be good in matter, but not true in fact, he may reply to it and proceed to examine witnesses in the same way as in case of a replication to an answer; but such a proceeding is always an admission of the sufficiency of the plea itself, as much so as if it had been set down for argument and allowed; and if the facts relied on by the plea are proved, a dismissal of the bill on the hearing is a matter of course."<sup>5</sup> Equity Rule 33 in the United States courts

<sup>1</sup> *American Bible Society v. Hague*, 10 Paige, 549.

<sup>2</sup> *Coster v. Murray*, 7 Johns. Ch. 167.

<sup>3</sup> *Bolton v. Gardner*, 8 Paige, 273.

<sup>4</sup> Equity Rule 34. Under this rule permission to answer cannot be denied the defendant. *Wooster v. Blake*, 7 Fed. Rep. 816.

<sup>5</sup> *Hughes v. Blake*, 6 Wheat. 453, 472; *Harris v. Ingledew*, 8 P. Wms.

94; *Bean v. Clark*, 30 Fed. Rep. 225; *Birdseye v. Heilnes*, 27 Fed. Rep. 289; *Bogardus v. Trinity Church*, 4 Paige, 178; *Dows v. McMichael*, 2 Paige, 344; *Cottle v. Krementz*, 25 Fed. Rep. 494; *Farley v. Kittson*, 120 U. S. 308, 314; *Hoxie v. Hoxie*, 7 Paige, 187. Upon replication to a plea, nothing is in issue except what is distinctly averred in the plea, and if that is established at the hearing, the

which now provides that if, when the plaintiff takes issue on the plea, the facts stated therein shall be determined for the defendant, "they shall avail him as far as in law and equity they ought to avail him," changes the old rule that a replication to a plea admits its sufficiency; and hence, when the facts found under such an issue show that the plaintiff is equitably entitled to part of the relief prayed as against one defendant, and to all of it as against another, the bill will not be dismissed, but the appropriate relief will be granted.<sup>1</sup> At the hearing the defendant has the right to open and close the argument, and the burden of proof rests on him.<sup>2</sup>

**§ 330. Overruling a plea as false.**—If the defendant pleads a false plea and it be so found the complainant is entitled to a decree, which may be based on an admission in the plea as well as the allegations in the bill. For instance, a creditor filed a bill against an executor for discovery of assets and application thereof to his debt. The defendant's plea admitted sufficient assets but denied the validity of the claim. On the hearing the claim was sustained, and although it appeared that the executor had not in fact sufficient assets, his admission was held to support a personal decree against him.<sup>3</sup>

plea is a bar to so much of the bill as it professes to cover. *Fish v. Miller*, 5 Paige, 26. Where the court has held that there is equity in defendant's equitable plea praying relief against the plaintiff, the latter cannot dismiss the case in vacation, so as to prevent a trial of the issues made by the plea. *Frierson v. Alexander*, 74 Ga. 666.

<sup>1</sup> *Pearce v. Rice* (U. S.), 12 S. Ct. Rep. 180. See, also, *Todd v. Munson*, 58 Conn. 579, where the court said that if the allegations of a complaint or defense, which are manifestly insufficient in substance, are yet traversed and found true on the traverse, it does not necessarily follow that the party in whose favor the issue is found is entitled to judgment.

<sup>2</sup> *Gernon v. Boecaline*, 2 Wash. (C. C.) 199; *Stead's Ex'rs v. Course*, 4

*Cranch*, 408, 418; *Farley v. Kittson*, 120 U. S. 308.

<sup>3</sup> *Kennedy v. Cresswell*, 101 U. S. 641. In this case Mr. Justice Bradley said:—"Since, then, the complainants were entitled to a decree, the question is, what decree? If a defendant plead a false plea, and it be so found, what is next to be done? Is it to be merely overruled and an order made that he answer further, as in the case of overruling a demurrer, or of overruling a plea for insufficiency? This is not the usual course. Having put the plaintiff to the trouble and delay of an issue the defendant cannot, after it is found against him, claim the right to file an answer, although if the complainant denies a discovery, which the plea sought to avoid, he may undoubtedly insist upon it. But that is the com-

Where a plea to the bill has been overruled on the merits, the same matter cannot be set up in the answer as a bar to the suit without the special permission of the court.<sup>1</sup> If a plea contains several distinct averments or allegations of fact, all the allegations must be supported by the proofs, or the plea will be overruled as false.<sup>2</sup> It was held in Tennessee by a divided court that a defendant, after an unsuccessful trial on his plea to the jurisdiction, might answer to the merits.<sup>3</sup>

plainant's right, not the defendant's. Lord Hardwicke said:—'All pleas must suggest a fact; it must go to a hearing; and if the party does not prove that fact which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery, but the court may direct an examination on interrogatories in order to supply that.' *Brownsword v. Edwards*, 2 Ves. 248. This statement is adopted by Lord Redesdale, Mr. Beames, and all subsequent writers on equity pleading. Mitf. (4th ed.) 802; Beames' Pleading in Equity, 818; Story, Eq. Pl., § 697. If the plea is found to be false, it would seem to be just and equitable that the case should stand as if the defendant had admitted the allegations of the plaintiff. Sir Thomas Plumer states the matter thus:—'Supposing a plea to be correct in form, but proved false, it seems to be conceived that the course at the hearing is to take it up just as if there was no answer. That is not correct. Upon a plea found false, the plaintiff is entitled to a decree; and if a discovery is wanted, the defendant is ordered to be examined upon interrogatories.' *West v. Strickland*, 2 Ves. & B. 150. Chancellor Walworth, in a case before him where the defendant pro-

duced no evidence to establish the truth of his plea, said:—'Where a plea in bar to the whole bill is put in, if the complainant takes issue thereon he admits the sufficiency of the plea, and leaves nothing in question but the truth thereof. If at the hearing the plea is found to be true the bill must be dismissed. But if the plea is untrue, the complainant will be entitled to a decree against the defendant in the same manner as if the several matters charged in the bill had been confessed or admitted. If a discovery is necessary to enable the complainant to obtain the relief sought for by his bill, the defendant cannot evade answering by putting in a plea which turns out to be false. In such a case, after the plea is overruled as false, complainant may have an order that the defendant be examined on interrogatories before a master as to the several matters in relation to which a discovery was sought by the bill.'"  
*Dows v. McMichael*, 2 Paige, 345.

<sup>1</sup>*Townsend v. Townsend*, 2 Paige, 418.

<sup>2</sup>*Down v. McMichael*, 6 Paige, 189.

<sup>3</sup>*Battelle v. Youngstown Rolling Mill Co.*, 16 Lea (Tenn.), 85, where all the Tennessee authorities are reviewed and discussed.

## CHAPTER XI.

### ANSWERS.

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(a) ANSWER AS A PLEADING.

§ 331. Nature of an answer.—An answer generally controverts the facts stated in the bill, or some of them, and states other facts to show the rights of the defendant in the subject of the suit. But sometimes it admits the truth of the case made by the bill, and, either with or without additional facts, submits the questions arising upon the case thus made to the judgment of the court.<sup>1</sup> An answer, in cases where

<sup>1</sup> Story's Equity Pleading (10th ed.), § 849. United States Equity Rule 89 provides as follows:—"The rule that if a defendant submits to answer he shall answer fully to all the matters of the bill shall no longer apply in cases where he might by

plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of



relief is sought, properly consists of two parts: first, of the defense of the defendant to the case made by the bill; and secondly, of the examination of the defendant on oath, as to the facts charged in the bill, of which a discovery is sought,

or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar, and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration without notice may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea." In *Reed v. Cumberland Ins. Co.*, 86 N. J. Eq. 146, 152, the court said:—"The defendant may claim by the answer [which contained a demurrer for want of jurisdiction] the same benefit that he would have been entitled to if he had demurred to the bill, or pleaded the matter alleged in his answer in bar; but in such case it is only at the hearing of the cause that any such benefit can be insisted upon. He will, however, then, in general, be entitled to all the same advantage of this mode of defense that he would have had if he had adopted the more concise mode of demurring or pleading;" citing *Wray v. Hutchinson*, 2 Myl. & K. 235, 238, 242; *Mulligan v. Mitchell*, 1 Myl. & C. 438, 447; *Clark v. Flint*, 22 Pick. 281; *Ludlow v. Simond*, 2 Cal. Cas. in Err. 1, 40. But in such a case the answer must point out a specific defect in the bill. *Manning v. Merritt*, Clarke's Ch.

98; *Holmes v. Dale*, Clarke's Ch. 71; *Matthewson v. Johnson*, Hoff. Ch. 560 (multifariousness). Answers in chancery which deny both the truth and the sufficiency of the allegations of the bill are sanctioned in Connecticut by long and general practice. *Arnold v. Middletown*, 89 Conn. 401. It is not proper pleading to incorporate a demurrer into an answer unless the demurrer is left for consideration as if it stood alone. *Holt v. Daniels*, 61 Vt. 89; s. c., 17 Atl. Rep. 786. But under the Michigan practice, a separate hearing is permitted only on a regular demurrer. *Zabel v. Harshman*, 68 Mich. 270; s. c., 86 N. W. Rep. 71. "It is not an unusual thing in practice for an answer to conclude by the defendant's insisting that there is no equity in the complainant's bill and putting himself upon the judgment of the court respecting it. The practice rests upon sound policy. A demurrer admits the truth of the charges in the bill. A bill addresses itself to the conscience of the defendant, and when it contains charges of fraud or other immorality implicating the character of the defendant, an upright man would forego his legal rights rather than avail himself of a legal objection which, if successful, would deprive him of all opportunity of relieving his character by a denial of the charges." *Campbell v. Campbell's Adm'r*, 8 N. J. Eq. 738, 741. An answer may submit legal propositions arising on facts admitted by the bill or facts which it states. *McGuckin v. Kline*, 81 N. J. Eq. 454.

and to which interrogatories are usually addressed.<sup>1</sup> As a general rule the defendant can pray nothing but to be dismissed, and if he has any relief to pray or discovery to seek, he must do so by cross-bill.<sup>2</sup> A defendant may set up matter in his answer by way of avoidance or defense which has occurred since the filing of the bill.<sup>3</sup> And the answer may contain defenses previously raised by plea or demurrer and overruled.<sup>4</sup> "Resort is frequently had to an answer in order to set up a defense which would be proper in a plea, for the reason that less certainty and precision is required in an answer than in a plea."<sup>5</sup>

**§ 332. Defenses properly taken by answer illustrated.—** Where a contract is sought to be enforced in equity, the defense that the defendant was induced to sign it by undue influence may be set up by answer, and is not obnoxious to the rule that the defendant cannot have positive relief upon an answer.<sup>6</sup> So, where a vendor brings a suit for foreclosure on a mortgage by his vendee, the latter may claim by answer an abatement

<sup>1</sup> Story's Equity Pleading (10th ed.), § 850.

<sup>2</sup> Miller v. Gregory, 16 N. J. Eq. 274; Cullum v. Erwin, 4 Ala. 542; Chapin v. Walker, 6 Fed. Rep. 794; a. c., 2 McCrary, 175; Cummings v. Gill, 6 Ala. 562; Goodwin v. McGehee, 15 Ala. 282; Hubbard v. Turner, 2 McLean, 519; Morgan v. Tipton, 3 McLean, 339; Ford v. Douglas, 5 How. 148; Armstrong v. Chemical Nat. Bank, 37 Fed. Rep. 466; McGuckin v. Kline, 31 N. J. Eq. 454, 460; Ringo v. Woodruff, 48 Ark. 469; Black v. Keiley, 23 N. J. Eq. 358; Hoff v. Bird, 17 N. J. Eq. 201; Aspinwall v. Aspinwall, 49 N. J. Eq. 302; ch. XII, *infra*. As to waiver by replication and hearing on the merits, see Baxter v. Seattle, 3 Wash. St. 352; a. c., 27 Pac. Rep. 537.

<sup>3</sup> Lyon v. Brooks, 2 Edw. Ch. 110; Turner v. Robinson, 1 Sim. & S. 8; Earl of Leicester v. Perry, 1 Bro. C. C. 805.

<sup>4</sup> Dormer v. Fortescue, 2 Atk. 284;

Crawford v. The William Penn, 3 Wash. 484; Storms v. Kansas Pac. Ry. Co., 5 Dill. 486; Burnley v. Town of Jeffersonville, 3 McLean, 336.

<sup>5</sup> McCabe v. Cooney, 2 Sandf. Ch. 314. See, also, Maury v. Mason, 8 Porter (Ala.), 213, 228. The court may at any time, before a cause is set for hearing, permit a withdrawal of the answer and the filing of a demurrer, upon good cause shown. Lowe v. Morris, 4 Sneed, 70; Merchant v. Preston, 1 Lea, 283; Cook v. Richards, 11 Heisk. 714; Chestnut v. Frazier, 6 Bax. 219, holding, however, that it cannot be done without leave of the court. "The rules of chancery to expedite and facilitate the preparation of suits are not so imperative and inflexible that upon sufficient cause shown the chancellor may not relax them." Marsh v. Crawford, 1 Swan, 116. See Pawley v. M'Gimpsey, 7 Yerg. 502.

<sup>6</sup> Ran v. Von Zedlitz, 183 Mass. 164.

on account of deficiency in the contents of the premises.<sup>1</sup> In a suit for deficiency after the foreclosure of a mortgage against a vendee of the premises whose assumption of the payment of the mortgage appeared in his deed, the defendant filed an answer denying that he assumed its payment and averring that the assumption was inserted in his deed by mistake. The court said:—"This defense should regularly be set up by cross-bill, but this court has entertained it when set up by answer without cross-bill in cases of claim for deficiency, from the consideration that if the matter can be satisfactorily tried without a cross-bill, a regard to economy and a desire to favor simplicity in the mode of presenting the issue recommend the method. But in all cases in which the defense has been so set up, the court has required the same amount of proof which would have been required had the issue been presented on a cross-bill, and has laid the burden of proof on the defendant."<sup>2</sup> A defendant in a foreclosure suit may avail himself by answer without a cross-bill of a mistake in the mortgage, whereby it embraced more than was intended. A decree may be made declaring that the complainant is not entitled to a sale of the property which should have been omitted.<sup>3</sup> Fraud in the consideration of a prior incumbrance may be set up by a mortgagee in his answer without filing a cross-bill; and a general allegation of such fraud is sufficient, where the fraud alleged is that the mortgage was given to defraud creditors and was without consideration.<sup>4</sup> A set-off in equity in favor of a defendant can only be had upon a cross-bill filed by him; but when the defense is only in the nature of a set-off in equity by showing a discharge of the liability sought to be enforced before the filing of the bill, there is no necessity for a cross-bill.<sup>5</sup> Where a proceeding is had for a mutual accounting and a balance is found due from the complainant, the defendant's answer is sufficient to sustain a decree for payment.<sup>6</sup>

<sup>1</sup> Melick v. Dayton, 84 N. J. Eq. 245; Dayton v. Melick, 27 N. J. Eq. 863.

<sup>2</sup> Randolph v. Wilson, 38 N. J. Eq. 28, 29. See § 428, *infra*.

<sup>3</sup> Ames v. N. J. Franklinite Co., 12 N. J. Eq. 66. See § 428, *infra*.

<sup>4</sup> McGuckin v. Kline, 81 N. J. Eq. 454. But see Brinkerhoff v. Franklin, 21 N. J. Eq. 884.

<sup>5</sup> Goodwin v. McGehee, 15 Ala. 282.

<sup>6</sup> Wyatt v. Sweet, 48 Mich. 539.

**§ 333. Defenses improper for an answer.**—"In the absence of fraud a defendant cannot show under an answer alone that a contract which is perfect and complete in all its parts differs in a material respect from the contract which he made; but if he desires to show that such is the fact, he must ask by cross-bill to have the contract reformed."<sup>1</sup> A mortgage cannot be reformed upon a prayer in the answer to a bill for foreclosure;<sup>2</sup> nor can substantive relief, by way of specific performance of an agreement, be afforded upon an answer.<sup>3</sup> An answer to a bill to foreclose a purchase-money mortgage cannot impeach the contract of sale for false and fraudulent representations. The complainant is entitled to the benefit of an answer to such charges of fraud, and they can only be drawn in question by cross-bill.<sup>4</sup> A defendant cannot, by simple answer, avail himself of the defense of fraud in the consideration of a mortgage, which does not go to the extent of a complete nullification of the instrument.<sup>5</sup> Where defendant, the holder of a first and third mortgage, assigned the first one to her agent absolutely, who assigned it to the complainant to secure his own debt, it was held that the defendant, being a party to the suit as third mortgagee, could have no relief against the complainant by answer, but only by cross-bill if at all.<sup>6</sup> Upon a bill filed to settle the accounts of one partnership, a settlement of the accounts of another and different partnership cannot be effected upon the defendant's answer.<sup>7</sup> In a suit for specific performance, relief based upon an alleged rescission of the contract cannot be granted except upon a cross-bill.<sup>8</sup>

**§ 334. General requisites of an answer.**—It is an elementary doctrine of equity pleading that if a defendant submits to

<sup>1</sup> Beck v. Beck, 48 N. J. Eq. 89, 48. 274; O'Brien v. Hulfish, 22 N. J. Eq.

<sup>2</sup> French v. Griffin, 18 N. J. Eq. 471.

279; Allen v. Roll, 25 N. J. Eq. 164.

See, also, Fey v. Fey, 27 N. J. Eq. 213. Cf. Ames v. N. J. Franklinite Co.,

12 N. J. Eq. 66.

<sup>3</sup> Duryee v. Linsheimer, 27 N. J. Eq. 366. But see § 429, *infra*.

<sup>4</sup> Miller v. Gregory, 16 N. J. Eq.

<sup>5</sup> Parker v. Jameson, 33 N. J. Eq.

222; Parker v. Hartt, 32 N. J. Eq. 225.

<sup>6</sup> Grocers' Bank v. Neet, 29 N. J. Eq. 450.

<sup>7</sup> Brewer v. Norcross, 17 N. J. Eq. 219.

<sup>8</sup> Leicester Piano Co. v. Front Royal &c. Imp. Co., 55 Fed. Rep. 190.

answer his answer must be full and perfect to all the material allegations in the bill, and he must admit or deny all the facts stated in the bill with all their material circumstances without any special interrogatory for that purpose.<sup>1</sup> Averments in the stating part of a bill, evidently intended as statements of facts, must be answered by the defendant if he intends to deny them, although the complainant "charges" the facts instead of "shows" or "alleges" them.<sup>2</sup> A partner, bound to account, must give a clear, distinct and intelligible statement of the result of the business, referring also to particular books, and to the page, if necessary, so that a party entitled thereto may inquire into and investigate its correctness. A reference to the books of the concern, generally, and to former accounts is not sufficient.<sup>3</sup> An answer simply averring that the facts stated in a paper, purporting to be the answer of another defendant in the cause, "are substantially correct as far as these defendants are concerned," is formally and substantially defective.<sup>4</sup> In a bill for partition averments that the complainants and defendants are tenants in common of land sought to be partitioned, being in support of the complainant's case, the

<sup>1</sup> Chappell v. Funk, 57 Md. 465, 477; Story's Equity Pleading (10th ed.), § 852; M. E. Church v. Jaques, 1 Johns. Ch. 65; Davis v. Mapes, 2 Paige, 105; Mechanics' Bank v. Levy, 8 Paige, 606; Cuyler v. Bogert, 8 Paige, 186; Bank of Utica v. Messereau, 7 Paige, 517; Champlin v. Champlin, 2 Edw. Ch. 858, 865. "It is a general rule that the substance only of the issue need be proved; nor is it necessary that the same degree of accuracy should be observed in an answer as is required in a bill." King v. King, 9 N. J. Eq. 44, 58. "If the defendant has no affirmative defense, the answer need contain nothing but discovery unless the defendant proposes to offer a line of evidence in disproof of the bill which may take the plaintiff by surprise; in which case it will be prudent to indicate the nature of such evidence in the answer. This should be done also

whenever it is at all doubtful whether the evidence establishes an affirmative defense or is in denial of the bill." Langdell's Eq. Pl., § 79.

<sup>2</sup> Halsey v. Ball, 36 N. J. Eq. 161; Smith v. Clark, 4 Paige, 868. Whatever a complainant is bound to state in his bill, the defendant may be required to admit or deny by his answer. Van Cortlandt v. Beekman, 6 Paige, 489.

<sup>3</sup> Gordon's Adm'r v. Hammell, 19 N. J. Eq. 216, citing White v. Williams, 8 Vea. 198; Christian v. Taylor, 11 Sim. 401; Davis v. Mapes, 2 Paige, 105.

<sup>4</sup> Carr v. Weld, 18 N. J. Eq. 41. Where a bill asked for a discovery of the contents of a lost policy of insurance, an answer referring to a copy of such policy as annexed thereto, and having such copy annexed, was sufficient. Reed v. Cumberland Ins. Co., 36 N. J. Eq. 147.

defendants are bound to discover their title in answer thereto.<sup>1</sup> An averment in an answer to a bill to enforce a vendor's lien that it was "understood" that a certain account should be set off without alleging that it was so agreed, nor by whom it was so understood, was held insufficient.<sup>2</sup> An allegation in the answer, as a defense to a bill for foreclosure of a purchase-money mortgage, that "part" of the land intended to be conveyed has been omitted from the description by metes and bounds, without stating what part, or whether the land is not otherwise sufficiently described, is defective.<sup>3</sup> A bill charged a sale on credit without taking security. The answer admitted the sale "but not without taking security therefor." This was a negative pregnant, and the court said the defendant was bound to go on and say what security he took and to discover all the particulars concerning it.<sup>4</sup> The defendant must answer as to all facts within his knowledge, or which he can ascertain from an inspection of books and papers in his possession or under his control.<sup>5</sup> A denial of two allegations conjunctively is not a denial of each.<sup>6</sup>

**§ 335. Exceptions to the rule requiring a full answer.—** There are several well-recognized exceptions to the rule that where a defendant submits to answer he must answer fully.<sup>7</sup>

<sup>1</sup> *McClaskey v. Barr*, 40 Fed. Rep. 559. See, also, *Lucas v. King*, 10 N. J. Eq. 377; *Overton v. Woolfolk*, 6 Dana, 874.

<sup>2</sup> *Lewis v. Cranmer*, 36 N. J. Eq. 124.

<sup>3</sup> *Allen's Ex'r v. Roll*, 25 N. J. Eq. 168.

<sup>4</sup> *Robinson v. Woodgate*, 3 Edw. Ch. 432.

<sup>5</sup> *Davis v. Mapes*, 2 Paige, 105.

<sup>6</sup> *Pierson v. Ryerson*, 5 N. J. Eq. 196. An allegation of payment in chancery pleadings is sustained by proof of satisfaction in any way, as by set-off, award and satisfaction, etc. *King v. King*, 9 N. J. Eq. 44. When the bill omits certain parts of a contract, the answer may well set out fully the negotiations by way of

defense. *Grey v. Bowman* (N. J. Eq.), 18 Atl. Rep. 326. The defendant must stand upon the case made by his answer. He cannot have the benefit of a defense not alleged. *Marsh v. Mitchell*, 26 N. J. Eq. 497. Thus a defendant who set up in his answer an absolute legal ownership of a mortgage was held not entitled to the benefit of an equitable interest only. *Gilbert v. Galpin*, 11 N. J. Eq. 445.

<sup>7</sup> United States Equity Rule 44 provides that "a defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he



- (1) He is not bound to answer to matters which are purely scandalous, or impertinent, or immaterial, or irrelevant.<sup>1</sup>  
 (2) He is not bound to answer to anything which may subject him to any penalty, forfeiture or punishment.<sup>2</sup> (3) He is

shall answer other parts of the bill from which he might have protected himself by demurrer."

<sup>1</sup>Story's Equity Pleading (10th ed.), § 846; *Wiswall v. Wandell*, 3 Barb. Ch. 812; *Utica Ins. Co. v. Lynch*, 3 Paige, 210. But see *Hogencamp v. Ackerman*, 10 N. J. Eq. 267. The defendant cannot in his answer to the bill excuse himself from making a full discovery, by merely denying the complainant's title to discovery and relief; as the complainant is entitled to a discovery of all matters which will be essential to the relief claimed in case he should succeed in showing that the particular defense set up in the answer is false or unfounded. *Bank of Utica v. Messereau*, 7 Paige, 517. That averments in the charging part of a bill are only made upon information and belief does not excuse the defendant from answering. *Leavenworth v. Pepper*, 32 Fed. Rep. 718. The defendant cannot defeat a full discovery by denying that the evidence will be of assistance to the complainant. It is only when it can be seen that the interrogatories, if answered affirmatively, would not assist the complainant in establishing his cause of action that answers will be dispensed with. *Anderson v. Kissam*, 28 Fed. Rep. 900. The defendant may accompany an admission or denial with explanations by way of avoidance; and if the complainant desires further information he should get it through the interrogatories or charging part of his bill. If he has omitted these his course is to amend. *Whitney v. Belden*, 1 Edw. Ch. 386.

In Vermont a defendant may answer in part and by his answer state grounds why he should not be compelled to make further answer. *Hunt v. Gookin*, 6 Vt. 462. See, also, *Phillips v. Prevost*, 4 Johns. Ch. 205, 209; *M. E. Church v. Jaques*, 1 Johns. Ch. 65; *Desplaces v. Goris*, 1 Edw. Ch. 850.

<sup>2</sup>Story's Equity Pleading (10th ed.), § 846; *Beach on Modern Equity Jurisprudence*, §§ 871, 872; *Leggett v. Postley*, 2 Paige, 599; *Livingston v. Harris*, 3 Paige, 528; *Taylor v. Bruce*, 2 Barb. Ch. 302; *Union Bank v. Barker*, 3 Barb. Ch. 358; *Adams v. Porter*, 1 Cush. 170; *Short v. Mercier*, 3 McN. & G. 217; *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Greensward v. Union Diene Sav. Inst.*, 59 How. Pr. 401; *Claridge v. Hoare*, 14 Ves. Jr. 59, 65; *Marsh v. Davison*, 9 Paige, 580; *Jones v. Jones*, L. R. 22 Q. B. Div. 425; *Hunnings v. Williamson*, L. R. 10 Q. B. Div. 459; *Litchfield v. Bond*, 6 Beav. 88; *Higdon v. Heard*, 14 Ga. 265; *Skinner v. Judson*, 8 Conn. 527; *Boyd v. United States*, 116 U. S. 616. The objection must be taken in the answer, *Sloman v. Kelly*, 3 Y. & C. 673, and on oath. *Fisher v. Owen*, 47 L. J. Ch. 681; *Kirschner v. State*, 8 Wis. 140. A defendant in a suit at law can be compelled by a bill of discovery to answer, though the discovery may be fatal to the defense he sets up. *Lane v. Stebbins* (1841), 3 Edw. Ch. 480; *Conant v. Delafield*, 4 Edw. Ch. 858. A charge in a bill that a defendant on the purchase of goods fraudulently concealed his situation and circumstances, and that another



not bound to answer what would involve a breach of professional confidence.<sup>1</sup> (4) He is not bound to discover the facts respecting his own title, but merely those which respect the title of the plaintiff.<sup>2</sup> "In each of these cases if the defendant does not think proper to defend himself from a discovery by a demurrer or by a plea, he has been permitted by answer to insist that he is not obliged to make the discovery. In each of these cases the plaintiff may except to the defendant's answer as insufficient; and upon that exception it will be determined by the court whether the defendant is or is not obliged to make the discovery.<sup>3</sup>

**§ 336. Answer to bill for account.**—Where a bill is filed for an account, and the account does not appear by the allegations and charges in the bill to be useful in establishing the complainant's right to the relief he asks, but appears merely as that which must ultimately be rendered in fulfillment of an obligation the enforcement of which is sought, the defendant need not set out the account in his answer, in case it is necessary to resort to answer rather than to plea or demurrer; but if the right to relief may be resisted by plea or demurrer, and the defendant, instead of availing himself of those pleadings, chooses to answer, he must do so fully and without reserve, setting out the account; for his submission to answer in such case is voluntary.<sup>4</sup>

defendant falsely represented such situation and circumstances, does not impute a felony to either of the defendants, and they must answer as to the fraud alleged. *Attwood v. Coe*, 4 Sandf. Ch. 412. See, also, *Watts v. Smith*, 44 Miss. 80; *Glynn v. Houston*, 1 Keen, 329; *Cauley v. Shackwell*, 1 Bligh (N. S.), 131.

<sup>1</sup>Story's Equity Pleading (10th ed.), § 846; *Stratford v. Hogan*, 2 Hall & B. 164; *Jones v. Pugh*, 12 Sim. 470; *Greenough v. Gaskell*, 1 Myl. & K. 98. See, also, *Beach on Modern Equity Jurisprudence*, § 886 *et seq.*

<sup>2</sup>Story's Equity Pleading (10th ed.), § 846; *Cayler v. Bogert*, 3 Paige, 186.

<sup>3</sup>Story's Equity Pleading (10th ed.), § 846.

<sup>4</sup>*Pace v. Battles*, 45 N. J. Eq. 371, 377, overruling exceptions to the answer, but "because of the conflict of authority," without costs. The question whether a defendant may refuse to give an account, when he denies by answer the facts upon which the complainant's right to an account is based, has given rise to much contrariety of opinion among judges. Professor Langdell contends that he may refuse. *Langdell's Eq. Pl.*, §§ 70-78. The numerous cases upon the subject were admirably reviewed by Chancellor Kent, in *Phillips v.*

§ 337. **Specific denials required.**—“It is a requisite of pleading that if the fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the bill, but must answer the point and substance positively and certainly.”<sup>1</sup> As a general rule, if the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular, or admitting some and denying the others, according to the fact.<sup>2</sup>

Prevost (1819), 4 Johns. Ch. 205, and by Chancellor Cooper, in *French v. Rainey* (1876), 2 Tenn. Ch. 640. In the former case Chancellor Kent's view was that it must depend on the reason and convenience of the case whether the general rule that when a defendant submits to answer he must answer fully will be enforced; and that the rule, though it may be termed general, is not inflexible. The conclusion reached by Chancellor Cooper, in the last case cited, was that, where the objection to discovery is founded upon a denial of the complainant's right of suit, the defendant is entitled by answer to protect himself from the discovery consequential to the relief sought, but not from the discovery which will aid the complainant in obtaining that relief. Judge Story says:—“But where the defendant sets up a title in himself, apparently good, and which the plaintiff must remove to found his own title, the defendant is not generally compelled to make any discovery not material to the trial of the question of title.” Story's *Equity Pleading*, § 852b. *Armstrong v. Crocker*, 10 Gray, 269, holds that if the existence of the alleged transactions is denied, the defendant need not render an account. For cases bearing on the subject, see *Elmer v. Creasy*, L. R. 9 Ch. 69, 71; *Stephens v. Stephens*, 2 Sel. Cas. 51; *Gethin v. Gale*, Ambler, 853; *Shepherd v. Roberts*, 8 Bro. C. C. 289; *Jerrard v.*

*Saunders*, 2 Ves. Jr. 457; *Hall v. Noyes*, 8 Bro. C. C. 488, note; *Marquis of Donegal v. Stewart*, 3 Ves. 446; *Phelips v. Carey*, 4 Ves. 107; *Randal v. Head*, Hardres, 188; *Sweet v. Young*, Ambler, 853; *Jacobs v. Goodman*, 2 Cox, 282; s. c., 3 Bro. C. C. 488; *John v. Ducie*, 18 Price, 682; *Shaw v. Cling*, 11 Ves. 288; *Rowe v. Teed*, 15 Ves. 376; *Mazarredo v. Maitland*, 8 Mad. 72; *Leonard v. Leonard*, 2 Ball & B. 828; *Adams v. Fisher*, 8 Myl. & Cr. 526; *Lancaster v. Evors*, 1 Ph. 349; *Swinborne v. Nelson*, 16 Beav. 416; *Clegg v. Edmonson*, 22 Beav. 125; *De La Rue v. Dickenson*, 8 Kay & J. 388; *Great Luxembourg Ry. Co. v. Magnay*, 28 Beav. 646; *Reade v. Woodroffe*, 24 Beav. 421; *Howe v. McKernan*, 80 Beav. 547; *Law v. Hunter*, 1 Russ. 100; *Walker v. Woodward*, 1 Russ. 107; *Hudson v. Trenton Mfg. Co.*, 16 N. J. Eq. 475.

<sup>1</sup> *Reed v. Cumberland Ins. Co.*, 86 N. J. Eq. 146, 158; *Ring v. Ray*, 11 Paige, 236; *Savage v. Benham*, 17 Ala. 119; *Grady v. Robinson*, 28 Ala. 289; *Woods v. Morrell*, 1 Johns. Ch. 108; *Hepburn v. Durand*, 1 Bro. Ch. 503; *Smith v. Loomis*, 5 N. J. Eq. 60. But a literal denial, although it might be held insufficient on exceptions, cannot be deemed an admission of the allegation. *White v. Wiggins*, 32 Ala. 424; *Russey v. Walker*, 32 Ala. 532; *Savage v. Benham*, 17 Ala. 119.

<sup>2</sup> *Davis v. Mapes*, 2 Paige, 105; *King v. Ray*, 11 Paige, 236.

Thus where a complainant files a judgment creditor's bill and charges that the defendant "has" property, it is not sufficient for the latter to deny in general terms that he has any; he must answer as to whether he had property at the time the bill was filed.<sup>1</sup> But if the complainant wishes to compel the defendant to state new matter set up by way of defense with more particularity, he should amend his bill and state the matter by way of pretenses and call upon the defendant to answer as to the particulars.<sup>2</sup>

**§ 338. Sufficiency of interrogatories.**—The defendant is not generally bound to answer an interrogatory unless the same is founded upon some distinct allegation or charge in the bill.<sup>3</sup> If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer and have their propriety tested upon exceptions to his answer, as he might by a demurrer to such interrogatories.<sup>4</sup> It is sufficient, however, if the interrogatory is founded upon a statement in the bill which is inserted therein merely as evidence in support of the main charges.<sup>5</sup> Under the modern practice when an interrogatory relates to a matter which is pertinent and may be material to the case made by the bill, and which the plaintiff has no means of knowing except by interrogating the defendant, and when the interrogatory is founded on the general allegations of the bill, the defendant is bound to answer, although the interrogatory is not founded on a specific allegation.<sup>6</sup>

<sup>1</sup> *Trotter v. Bunce*, 1 Edw. Ch. 578. See, also, *Van Cortlandt v. Beekman*, 6 Paige, 489.

<sup>2</sup> *Spencer v. Van Duzen*, 1 Paige, 555.

<sup>3</sup> *Grimm v. Wheeler*, 8 Edw. Ch. 834; *Mechanics' Bank v. Levy*, 8 Paige, 606, holding that where a fact is stated in the bill by way of recital merely, without any interrogatory calling for an answer as to that fact, the defendant is not bound either to admit or deny it.

<sup>4</sup> *Fuller v. Knapp*, 24 Fed. Rep. 100.

<sup>5</sup> *Mechanics' Bank v. Levy*, 8 Paige 606.

<sup>6</sup> *M'Garel v. Moon*, L. R. 10 Eq. 22, 25. In *Marsh v. Keith*, 1 Dr. & Sm. 842, the suit related to an incumbrance on an estate. It was necessary that the plaintiff should know, and he had no means of knowing, whether there were other incumbrances, and Vice-Chancellor Kindersley held that he was entitled to interrogate the defendant as to the existence of other incumbrances without making a fictitious allega-

**§ 339. Answers on knowledge, information or belief.**—Where a bill calls for an answer to several distinct averments according to defendant's knowledge, information and belief, an answer merely denying knowledge is defective. It ought also to include defendant's information.<sup>1</sup> Thus on a material charge of insolvency of a third person, it is not sufficient for the defendant to say "he does not know or believe;" he must add information.<sup>2</sup> A release of part of mortgaged premises had been recorded. An allegation of the defendant that he never heard of the release until after he bought was held under the circumstances not to be a sufficient denial of knowledge of the release.<sup>3</sup> If the defendant has any information

tion as a foundation for the interrogatory. See, also, *Hudson v. Grenfell*, 8 Giff. 888.

<sup>1</sup>*Reed v. Cumberland Ins. Co.*, 86 N. J. Eq. 146; *Smith v. Lasher*, 5 Johns. Ch. 247; *Tradesman's Bank v. Hyatt*, 2 Edw. Ch. 195; *Kinnaman v. Henry*, 6 N. J. Eq. 90. He should add to his denial of knowledge, if the fact be so, "and has not been informed except by the bill," etc. *Norton v. Warner*, 8 Edw. Ch. 106. The response, in an answer, to a material allegation of the bill, that "having no personal knowledge thereof, leaves the said complainant to make such proof as he may be advised," is insufficient, since defendant may have information or belief of a very strong character. *Ryan v. Anglesea R. Co.* (N. J. Eq.), 12 Atl. Rep. 539. It is not a sufficient answer to the matters charged in the bill for the defendant to aver that he has no knowledge or information of the same except what is derived from certain depositions taken previous to the filing of the bill; which depositions are not annexed to the answer nor the substance thereof stated therein. *Cuyler v. Bogert*, 8 Paige, 186. It is not sufficient to answer to certain specific facts charged in the

bill "that they may be true, etc., but the defendant has no knowledge of it, but is a stranger to the foregoing facts, and leaves the plaintiff to prove the same." *Smith v. Lasher*, 5 Johns. Ch. 247. A denial of knowledge or information as to an allegation of the petition, and calling for strict proof thereof, complies with Code Civil Proc. Kentucky, § 118, which provides that, as to facts not presumptively within the party's knowledge, a denial that he has sufficient information or knowledge to form a belief concerning them shall be a traverse. *Dickinson v. Gray* (Ky.), 9 S. W. Rep. 281. Where a defendant files an answer containing a general denial of the allegations of the bill, and the plaintiff objects to its being filed, but the attention of the court is not called to the grounds of the exception and it overrules the same, the plaintiff, by replying generally, waives all objection to such general denial. *Rogers v. Verlander*, 30 West Va. 619; s. c., 5 S. E. Rep. 847.

<sup>2</sup>*Robinson v. Woodgate*, 8 Edw. Ch. 422.

<sup>3</sup>*Pierson v. Ryerson*, 5 N. J. Eq. 196. "It would be unsafe for the court to suppose and act upon the

on a subject charged to be within his personal knowledge, other than such as is derived from the bill, he must answer as to such information and as to his belief or disbelief of the facts charged.<sup>1</sup> But where the defendant in his answer denies all knowledge of the fact charged in the bill, but admits his belief as to the fact charged, it is not necessary for him to deny any information on the subject.<sup>2</sup> And if he answers that he has not any knowledge or information of a fact charged in the bill, he is not bound to declare his belief one way or the other.<sup>3</sup> It is only when he states a fact upon information or hearsay that he is required to express his belief or unbelief.<sup>4</sup>

§ 340. *Inspection of documents.*—It is a matter of course to allow the complainant to inspect books and papers of the defendant referred to in his answer and thus made a part thereof, and the defendant may be compelled to produce them within a reasonable time although they are in the hands of his agent in a foreign country.<sup>5</sup> Where the defendant in his answer merely states the substance of a deed in his possession, without annexing a copy of the deed to his answer, and craves leave to refer to the same when produced, he makes it a part of his answer so far as to entitle the complainant to an order for the production of the deed. But if no such order is obtained and the deed itself is not produced upon the hearing, only the substance of such deed, as it is stated in the answer, is considered before the court as a part of the pleadings in the suit.<sup>6</sup> In respect of documents belonging to the complainant which may be material to him on a reference, and which are withheld from him by the defendant, the court will order their restoration, with a provision that no use be made of the order,

supposition that a want of observance of plain rules in answering is the result of inattention or want of skill or want of precision of language. It may proceed from an unwillingness to disclose the truth." *s. c.*, p. 203.

<sup>1</sup> *Utica Ins. Co. v. Lynch*, 3 Paige, 210; *Woods v. Morrell*, 1 Johns. Ch. 108.

<sup>2</sup> *Davis v. Mapee*, 2 Paige, 105.

<sup>3</sup> *Morris v. Parker*, 3 Johns. Ch. 297; *Utica Ins. Co. v. Lynch*, 3 Paige, 210; *King v. Ray*, 11 Paige, 236. See also, *Hall v. Wood*, 1 Paige, 404.

<sup>4</sup> *Morris v. Parker*, 3 Johns. Ch. 297.

<sup>5</sup> *Eager v. Wiswall*, 2 Paige, 369.

<sup>6</sup> *Roosevelt v. Ellithorp*, 10 Paige, 415.

or the fact of the restoration, or any circumstance connected with it by way of evidence in the cause.<sup>1</sup>

**§ 341. Process to compel an answer.**—When the complainant cannot get full relief without a discovery, and the defendant refuses to answer, he is entitled to process of attachment against the body of the defendant to compel an answer. The proceedings upon the writ are almost wholly regulated by statute or rules of court.<sup>2</sup> A United States equity rule pro-

<sup>1</sup> *Carpenter v. Benson*, 4 Sandf. Ch. 496, where it was said that the production of documents by the defendants on motion for the purpose of aiding the complainant in sustaining his suit is in the nature of an exception to the defendants' answer; and where an exception would not be sustained if the bill had called for a full statement of the document in the answer, a motion for its production will not be granted, although the answer admits its custody. In ordinary cases the complainant cannot be compelled, upon motion, to submit his books or other documentary evidence in his possession to the inspection of the defendant, to enable the latter to answer the bill and make his defense in the suit. But if the complainant, upon request, refuses to permit the defendant to inspect such books or documents, he cannot afterwards object that the answer is insufficient in not stating their contents. And where the books or documents are material to the defendant's defense of the suit, he must file a cross-bill against the complainant for the discovery of them. The rule is different as to partnership books and papers, to the inspection of which both parties have an equal right, but which are in the hands of one of the co-defendants, or of his assignees or representatives. In such a case, upon the application of either

party, and in any stage of the suit, the adverse party may be compelled to deposit the partnership books and papers which are in his possession or under his control in the hands of an officer of the court, for the inspection of the party making such application, and for such party to take copies thereof if necessary. *Kelly v. Eckford*, 5 Paige, 548. See, further, as to production of documents, *Story's Equity Pleading* (10th ed.), § 858 *et seq.*; *Hardman v. Ellames*, 2 Myl. & K. 756; *Peile v. Stoddart*, Mac. & Gord. 192; *Bannatyne v. Leader*, 10 Sim. 280; *Gardner v. Irvin*, 4 Ex. D. 49; *Pattison v. Skillman*, 48 N. J. Eq. 392; *Straker v. Reynolds*, 22 Q. B. D. 262; *Owen v. Wynn*, 9 Ch. D. 29; *Barnett v. Moore*, 1 Jac. & W. 227; *Quilter v. Heatly*, 23 Ch. D. 42; *Kearsley v. Philips*, 10 Q. B. D. 36, 465; *Beckford v. Wildman*, 16 Ves. 438; *Roberts v. Oppenheim*, 26 Ch. D. 724; *Brown v. Watkins*, 16 Q. B. D. 125; *Shaw v. Smith*, 18 Q. B. D. 193; *Bischoffsheim v. Brown*, 29 Fed. Rep. 841; *Swanston v. Lishman*, 45 L. T. (N. S.) 360; *Ellwand v. McDonnell*, 8 Beav. 14.

<sup>2</sup> See *Gibson's Suits in Chancery*, § 228 *et seq.*; *Buckingham v. Peddicord*, 2 Bland, 447. In the New York code there is no provision for compelling an answer. For the practice in the former New York court of chancery see 1 *Barbour's Ch. Pr.* (2d

vides that "it shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance. In default thereof the plaintiff may, at his election, enter an order (as of course) in the order-book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading or fully answering the bill within a period to be fixed by the court or judge, and undertaking to speed the cause."<sup>1</sup>

§ 342. Answer in patent cases.—The United States Revised Statutes provide that in a suit in equity for relief against an alleged infringement of a patent, the defendant may set up in his answer any one or more of the following defenses, giving notice therein that he will offer proof of the same:—"First, that for the purpose of deceiving the public, the description and specification filed by the patentee in the patent office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the decided effect; or second, that he had surrepti-

ed.), 87. See, also, Smith's Ch. Pr. (8d ed.) 250; 1 Daniell's Ch. Pr. (5th ed.) 488 *et seq.*

<sup>1</sup>Equity Rule 18. Under the old practice the bill could not be taken *pro confesso* until an attachment. If that were returned *non est inventus*, then an attachment with proclamations issued, after which, if also re-

turned in like manner, followed a commission of rebellion, which latter process might, in the discretion of the court, be returnable immediately. Upon a return of *non est inventus* thereon a sequestration was ordered. *Boudinot v. Symmes*, Wall. C. C. 189, 140; Smith's Ch. Pr. (2d ed.) 188-188.



tiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or third, that it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or fourth, that he was not the originator and first inventor or discoverer of any material and substantial part of the thing patented; or fifth, that it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention, knowledge or use of the thing patented, the defendant shall state the names of patentees and dates of their patents and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, a decree shall be entered in his favor with costs."<sup>1</sup> The defense that letters patent are void because the device was not patentable need not be set up in the answer.<sup>2</sup> Where notice is not given in the answer of a specified prior use of the invention described in the patent, it cannot be set up as an anticipation of such invention.<sup>3</sup> In order to admit proofs of previous invention and use as a defense, only the names of those who had invented or used the anticipating machine or improvement, not the names of those who are to testify of its invention or use, are required to be pleaded.<sup>4</sup> If the plaintiff makes no objection to testimony of prior invention and use, it is a waiver of want of notice in the defendant's answer. And an objection to the examination of a witness should state

<sup>1</sup> U. S. R. S., § 4920.

<sup>2</sup> *Hendy v. Golden State &c. Works*, 127 U. S. 370; *Dunbar v. Myers*, 94 U. S. 187; *Slawson v. Grand St. R. Co.*, 107 U. S. 649; *Mahn v. Harwood*, 112 U. S. 354, 358.

<sup>3</sup> *Stevenson v. Magowan*, 81 Fed. Rep. 824. The notice need not be under oath. *Campbell v. Mayor*, 45 Fed. Rep. 243.

<sup>4</sup> *Woodbury Planing Machine Co.*

*v. Keith*, 101 U. S. 479; *Wilton v. The Railroads*, 1 Wall. Jr. 195; *Many v. Jagger*, 1 Blatchf. 376; *Roemer v. Simon*, 95 U. S. 214. Notice in the defendant's answer of the time when the person possessed a knowledge or use of the invention is not required. The name, residence and place are sufficient. *Phillips v. Page*, 24 How. 164.

specifically the ground of the objection in order that the opposite party may have an opportunity of removing it, if possible.<sup>1</sup> If the thing patented is an entirety and incapable of division or separate use, the defense of prior invention should be addressed to the whole and not merely one or more of the separate claims.<sup>2</sup> Where the answer setting up prior invention and use specified the names of several persons and mentioned others whose names defendant prayed leave to insert when discovered, and two of the latter afterwards testified without objection, it was held that the court might properly allow their names to be added by amendment *nunc pro tunc*.<sup>3</sup> The fourth and fifth defenses are separate and independent, and each requires its appropriate notice or answer in order to let in testimony to establish the defense.<sup>4</sup> The defense of anticipation is not sufficiently set out by an answer which merely avers that the invention had been fully described and publicly made known in several patents, among them those of two persons named, stating the names and dates, without directly averring that the invention had been before patented; for an invention might be publicly made known by a patent and not be patented. But where, under such an answer, the patents referred to by it have been received in evidence without objection, and without subsequent motion to suppress, the right to object thereto is waived.<sup>5</sup> The burden of proving the defense of prior invention, if the patent is introduced in evidence, is on the defendant.<sup>6</sup>

**§ 343. Answer to charges of fraud.**—Where transactions are charged involving fraud, either actual or constructive, and especially where direct interrogatories are put in relation to particular facts, the court cannot be satisfied with a general answer, or one in any way evasive.<sup>7</sup> It has been said that in such a case the motives of the defendant, his secret

<sup>1</sup> Woodbury Planing Machine Co. v. Keith, 101 U. S. 479.

<sup>2</sup> Bates v. Coe, 98 U. S. 81; Parks v. Booth, 102 U. S. 96, 104.

<sup>3</sup> Roemer v. Simon, 95 U. S. 214.

<sup>4</sup> Meyers v. Busby, 82 Fed. Rep. 670.

<sup>5</sup> Saunders v. Allen, 58 Fed. Rep. 109.

<sup>6</sup> Marsh v. Seymour, 97 U. S. 848.

<sup>7</sup> Scull v. Reeves, 8 N. J. Eq. 85; Smith v. Loomis, 5 N. J. Eq. 60; Vreeland v. New Jersey Stone Co., 25 N. J. Eq. 140.

designs, his "unuttered thoughts" must be expressed.<sup>1</sup> So where the defendant sets up fraud, he should set it out circumstantially or else it will be of no avail.<sup>2</sup>

§ 344. Inconsistent defenses.—The defendant may set up any number of defenses in his answer, but they must be consistent with each other.<sup>3</sup> And "that answer is bad which either contains inconsistent defenses, or an alternative of inconsistent defenses."<sup>4</sup> Where the defendant sets up in his answer under oath two inconsistent defenses, the result will be to deprive him of the benefit of either; and this rule applies to such an answer used as an affidavit of merits on a motion to set aside a decree rendered by default.<sup>5</sup> But where an answer objectionable in this respect is not excepted to, and on the hearing one of the defenses pleaded is found to be untrue, and the other is established by proofs, a decree will not be reversed on account of the interposition of such untrue and inconsistent defense.<sup>6</sup>

§ 345. Defense of *res adjudicata*.—The defense of *res adjudicata* should be pleaded either by special plea in bar or relied upon in the answer.<sup>7</sup> If the fact does not appear either in the bill, plea or answer, it cannot be relied upon in the evidence.<sup>8</sup> An answer setting up the dismissal of a former bill filed by the complainants against the defendants for the same relief as a bar thereto must set up or exhibit the record of the case or it is of no avail.<sup>9</sup> The prayer in the answer that

<sup>1</sup> *Mechanics' Bank v. Levy*, 1 Edw. Ch. 316.

<sup>2</sup> *Hogencamp v. Ackerman*, 10 N. J. Eq. 267, 268. See §§ 107, 108, *supra*.

<sup>3</sup> *Stone v. Moore*, 26 Ill. 165; *Ledbetter v. Ledbetter*, 80 Mo. 60; *Crowder v. Searcy*, 103 Mo. 97; *Scanlan v. Scanlan*, 134 Ill. 630, 640; *Hopper v. Hopper*, 11 Paige, 46; *Leich v. Bailey*, 6 Price, 504; *Chapman v. School Dist.*, Deady, 108, 115.

<sup>4</sup> Per Alderson, B., in *Jesus College v. Gibbs*, 1 Y. & C. Ex. 145, 160.

<sup>5</sup> *Ozark Land Co. v. Leonard*, 24 Fed. Rep. 658.

<sup>6</sup> *Scanlan v. Scanlan*, 134 Ill. 630, 640.

<sup>7</sup> *Galloway v. Hamilton*, 1 Dana, 576. A defense of *res adjudicata* is not new matter, and may properly be set up by answer, although the complaint in the second suit sets up some additional grounds for relief, when such grounds existed at the time of the former suit, and it is not alleged that they were then unknown to plaintiff. *Breeze v. Haley*, 11 Colo. 351; s. c., 18 Pac. Rep. 551.

<sup>8</sup> *Turley v. Turley*, 85 Tenn. 251.

<sup>9</sup> *Bank of United States v. Beverly*, 1 How. 184.

the pleadings and proofs in the former suit may be made a part of the cause was held not to present the decree, and although copied in the transcript it was disregarded.<sup>1</sup> If, pending a suit, the complainant's claim is satisfied by proceedings in another court, the defendant should file a supplemental answer or cross-bill, and cannot stay the original suit upon a mere affidavit of the fact.<sup>2</sup>

§ 346. Answer setting up bona fide purchase.—The defendant may by answer take advantage of the fact that he is a *bona fide* purchaser without notice.<sup>3</sup> The answer must aver every fact necessary in such a case,—the deed of purchase, the debt, parties and contents briefly, that the vendor was in possession seized or pretending to be seized in fee;<sup>4</sup> the consideration must be stated expressly, and its payment and the time of payment; notice must be denied previous to and down to the time of paying the money, though notice be not charged in the bill; if facts are charged from which such notice may be inferred, they also must be denied.<sup>5</sup>

<sup>1</sup>Galloway v. Hamilton, 1 Dana, 576, an extreme illustration of the rule requiring this defense to be pleaded with particularity.

<sup>2</sup>Farmers' Loan & Trust Co. v. Reid, 3 Edw. Ch. 414.

<sup>3</sup>Stephens v. Gaule, 2 Vern. 701; Jerrard v. Saunders, 2 Ves. Jr. 454; Rowe v. Teed, 15 Ves. 372, 378; Donnell v. King, 7 Leigh, 393; Fox v. Coon, 64 Miss. 465; s. c., 1 So. Rep. 629; Downman v. Rust, 6 Rand. (Va.) 587; Carter v. Allan, 21 Gratt. 241; Rorer Iron Co. v. Trout, 83 Va. 397; s. c., 2 S. F. Rep. 713. But see Story's Equity Pleading (10th ed.), § 847. In Boone v. Chiles, 10 Peters, 211, treating of this defense, it was said:—"It is setting up new matter not in the bill. A new case is presented, not responsive to the bill, but founded on a right and title operating, if made out, to bar and avoid the plaintiff's equity, which must otherwise prevail. The answer setting it up is no

evidence against the plaintiff, who is not bound to contradict or rebut it."

<sup>4</sup>Rorer Iron Co. v. Trout, 83 Va. 397; s. c., 2 S. E. Rep. 713; 2 Sugden on Vendors, 844, 855, 850; Boone v. Chiles, 10 Peters, 17; Ledbetter v. Walker, 31 Ala. 175.

<sup>5</sup>Boone v. Chiles, 10 Peters, 177; Johnson v. Toulmin, 18 Ala. 50; De Vandel v. Malone, 35 Ala. 272; Moore v. Clay, 7 Ala. 742; Ledbetter v. Walker, 31 Ala. 175; Wells v. Morrow, 38 Ala. 125; Downman v. Rust, 6 Rand. (Va.) 587; Tompkins v. Mitchell, 2 Rand. (Va.) 480; Weston v. Berkely, 3 P. Wms. 244, note f; Brace v. Duchess of Marlborough, 2 P. Wms. 491; Harris v. Fly, 7 Paige. 422, 424; Denning v. Smith, 3 Johns. Ch. 345; Rorer Iron Co. v. Trout, 83 Va. 397; s. c., 2 S. E. Rep. 713; Murray v. Finster, 2 Johns. Ch. 155; Frost v. Beekman, 1 Johns. Ch. 288; Balcom v. New York L. Ins. & T. Co., 11 Paige, 454; Wyckoff v. Snif-

§ 347. **Laches and statute of limitations.**—The defense of the statute of limitations may be set up by answer;<sup>1</sup> and when so interposed it operates as and has the effect of a plea.<sup>2</sup> So if the facts upon which the defense of laches rests do not sufficiently appear on the face of the bill they may be set up in the answer.<sup>3</sup> In insisting upon the statute of limitations in an answer the same strictness and particularity are not required as in a plea of the statute.<sup>4</sup> Under an answer alleging that the cause of action did not accrue within six years, the defendant may have the benefit of a shorter period of limitation.<sup>5</sup>

§ 348. **Answer setting up the statute of frauds.**—The settled doctrine of the courts is that if the answer admits a contract without stating that it was not in writing and setting up the statute of frauds, the statute cannot be used as a defense. It is deemed to be an admission of a legal contract, and no proof need be offered of it.<sup>6</sup> If, however, the defend-

fen, 2 Edw. Ch. 581; *Graves v. Coultant*, 81 N. J. Eq. 763.

<sup>1</sup> *Hightstone v. Franks* (Mich.), 52 N. W. Rep. 1015; *Pierce v. McClellan*, 98 Ill. 245; *Nichols v. Padfield*, 77 Ill. 253; *Borders v. Murphy*, 78 Ill. 81; *Van Hook v. Whitlock*, 7 Paige, 373. See, also, *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1; *Elmendorf v. Taylor*, 10 Wheat. 168; *Boone v. Chiles*, 10 Peters, 177; *Pratt v. Vattier*, 9 Peters, 405, 416, 417; §§ 257, 258, 307, *supra*.

<sup>2</sup> *Pierce v. McClellan*, 98 Ill. 245, 248, where it is said that according to the ancient practice if the statute were set up by plea it would have to be accompanied by an answer. But it is now otherwise. *West Portland Homestead Ass'n v. Lownsdale*, 17 Fed. Rep. 205. See § 307, *supra*.

<sup>3</sup> *Snow v. Boston Blank Book Mfg. Co.*, 153 Mass. 456, where Allen, J., said:—"In our practice if a bill is demurred to on the ground of laches, and the demurrer is overruled, the defense may still be made in the an-

swer, provided there are any new facts to support it. And the waiver or withdrawal of a demurrer which assigns laches as one ground is no waiver of the defense of laches, but it merely amounts to saying that the defendant will present his defense of laches upon all the facts of the case, instead of presenting it simply upon the facts set forth in the bill." See § 258, *supra*.

<sup>4</sup> *Van Hook v. Whitlock*, 2 Edw. Ch. 304.

<sup>5</sup> *Phelps v. Elliott*, 35 Fed. Rep. 455; *Van Hook v. Whitlock*, 7 Paige, 373; *Bogardus v. Trinity Church*, 4 Paige, 178.

<sup>6</sup> *Walker v. Hill*, 21 N. J. Eq. 191, 203; *Ridgway v. Wharton*, 3 De G., M. & G. 677; *Cozine v. Graham*, 2 Paige, 177; *Champlin v. Parish*, 11 Paige, 405; *Ashmore v. Evans*, 11 N. J. Eq. 151; *Force v. Dutcher*, 18 N. J. Eq. 401, 405; *Van Dyne v. Vreeland*, 12 N. J. Eq. 148. See, also, *Battell v. Matot*, 58 Vt. 271.

ant admits the agreement but sets up the statute he will be entitled to the benefit of it notwithstanding his admission.<sup>1</sup> And the defense is available under an answer denying the agreement without insisting upon the statute.<sup>2</sup> In pleading the statute of frauds the answer must set up such defense as a *fact* and put it in issue distinctly. Stating in the answer that the contract is void in law and that the defendant is not bound to perform the same is not effective to let in the defense of the statute.<sup>3</sup>

§ 349. Answer setting up usury.— There can be no doubt that usury may be pleaded or relied upon in the answer,<sup>4</sup> which must set out with precision and accuracy the particular facts and circumstances of the supposed usurious agreement, that the court may see that it was in violation of the statute.<sup>5</sup> The terms of the usurious contract and the quantum of the usurious interest or premium must be specified and distinctly and correctly set out.<sup>6</sup> The general allegation at the close of

<sup>1</sup> Van Dyne v. Vreeland, 12 N. J. Eq. 143; Ashmore v. Evans, 11 N. J. Eq. 151.

<sup>2</sup> Coles v. Bowne, 10 Paige, 526; Champlin v. Parish, 11 Paige, 405; Forrester v. Flores, 64 Cal. 24; s. c., 28 Pac. Rep. 107; Ridgway v. Wharton, 2 De G., M. & G. 677; Battell v. Matot, 58 Vt. 271; May v. Rice, 101 U. S. 231; Whyte v. Arthur, 17 N. J. Eq. 521, denying a trust alleged in the bill; and Busick v. Van Ness, 44 N. J. Eq. 82, to the same point. Johns v. Norris, 22 N. J. Eq. 102; Walker v. Hill, 21 N. J. Eq. 191, 208; Van Dyne v. Vreeland, 12 N. J. Eq. 143. See, also, Ontario Bank v. Root, 3 Paige, 478; Vaupell v. Woodward, 2 Sandf. Ch. 143; Buttermere v. Hays, 5 M. & W. 456; Johnson v. Dodgson, 2 M. & W. 653; Leaf v. Tuton, 10 M. & W. 393; Eastwood v. Kenyon, 11 Ad. & El. 438. In a suit upon a parol agreement, void by the statute of frauds, the complainant is bound by the agreement as stated in the

answer, and upon reference to a master to state an account, the account should be made pursuant to the statement of the answer. Petrick v. Ashcroft, 20 N. J. Eq. 198.

<sup>3</sup> Vaupell v. Woodward, 2 Sandf. Ch. 143.

<sup>4</sup> McKim v. White Hall Co., 2 Md. Ch. 510, 513.

<sup>5</sup> Homeopathic L. Ins. Co. v. Crane, 25 N. J. Eq. 418; Turrell v. Byard, 24 N. J. Eq. 185; Beatty v. Brenner, 24 N. J. Eq. 812; Cleveland v. O'Neil, 29 N. J. Eq. 457; Taylor v. Morris, 22 N. J. Eq. 606; Suydam v. Bartle, 10 Paige, 94.

<sup>6</sup> Hannas v. Hawk, 24 N. J. Eq. 124; Rowe v. Phillips, 2 Sandf. Ch. 14. Allegations amounting to mere inferences are not sufficient. Leake v. Bergen, 27 N. J. Eq. 360; McKim v. White Hall Co., 2 Md. Ch. 510, 513; Rowe v. Phillips, 2 Sandf. Ch. 14. Thus a mere reference, in an answer, to an agreement for usury, that "by said corrupt and usurious contract

the answer that the contract is usurious does not enlarge or qualify the facts specifically stated and set forth as constituting the usury.<sup>1</sup> An averment in an answer that a "large amount of money mentioned in the mortgage was unjustly and unlawfully detained by the complainant as a bonus and unlawful interest, in excess of seven per cent. per annum, and not paid over to the defendants at the time of the execution of the mortgage, and that it has not been paid to them, or to any other person in their behalf, since the execution of the mortgage," was said to be so manifestly insufficient as a plea of usury that it was unnecessary to point out its defects.<sup>2</sup> But after issue joined upon an answer alleging usury generally it cannot be objected that the defense is not taken with greater legal precision.<sup>3</sup> Where an answer sets up usury without averring the place of contract, it will be presumed to refer to the law of the forum, and to that objection alone the defense must be limited.<sup>4</sup>

**§ 350. Answer by a married woman.**—A wife cannot answer separately from her husband in a suit against both without leave of the court.<sup>5</sup> And if there be ground for apprehension on the part of the wife that her husband will not make a proper defense for her, leave will be granted to her to answer separately from him.<sup>6</sup> If either husband or wife, where both

[the mortgagee] was to receive and has already received and taken more than seven dollars for the forbearance of one hundred dollars a year," no agreement whatever being set out, is insufficient. *Dawes v. Cammus*, 82 N. J. Eq. 456.

<sup>1</sup> *N. J. Patent Tanning Co. v. Turner*, 14 N. J. Eq. 826.

<sup>2</sup> *Watson v. Conkling*, 24 N. J. Eq. 230.

<sup>3</sup> *Chambers v. Chalmers*, 4 Gill & J. 420, 441.

<sup>4</sup> *Campion v. Kille*, 15 N. J. Eq. 478; *Atwater v. Walker*, 16 N. J. Eq. 42; *Cotheal v. Blydenburgh*, 5 N. J. Eq. 17, 19; *Dolman v. Cook*, 14 N. J. Eq. 56; *Campion v. Kille*, 14 N. J. Eq. 229; *Andrews v. Torrey*, 14 N.

J. Eq. 855. The answer in a foreclosure suit set up usury under the laws of New Jersey, but it appeared on final hearing that it was usury by the law of Pennsylvania instead. The court declined to give the complainant a decree, and directed an amendment of the answer, unless complainant was willing to take a decree with proper deductions. *Glad- ing v. Cubberly*, 29 N. J. Eq. 104.

<sup>5</sup> *Robbins v. Abrahams*, 5 N. J. Eq. 16; *Vandervere v. Holcomb*, 22 N. J. Eq. 555; *Crane v. Deming*, 7 Conn. 394; *Collard v. Smith*, 18 N. J. Eq. 48; *Toole v. De Kay*, 4 Sandf. Ch. 385.

<sup>6</sup> *Robbins v. Abrahams*, 5 N. J. Eq. 51, in which case she answers by her



are defendants, answer separately, without an order authorizing it, such answer will be suppressed on motion as irregular.<sup>1</sup> And the regular practice then requires that the defendants have an opportunity of putting in a joint answer on application for that purpose.<sup>2</sup> Where the wife appears after the bill has been taken as confessed against the husband, the complainant may proceed with the usual order that the wife answer or that the bill be taken as confessed by her.<sup>3</sup>

**§ 351. Answer by a corporation.**—Where the defendant is a corporation sole the answer and other proceedings are the same as if he were a private individual.<sup>4</sup> A corporation aggregate answers under its corporate seal. It cannot answer under oath, and the oath of one of its officers who is a party can have no efficacy. The answer only creates an issue between the parties.<sup>5</sup> Where a corporation filed an answer

next friend; Cooper's Eq. Pl. 325. If a husband as complainant makes his wife a defendant he treats her as a *feme sole* and she answers separately without a guardian *ad litem* or next friend. Copeland v. Granger, 8 Tenn. Ch. 487; *Ex parte* Strangers, 3 Atk. 478; Brooks v. Brooks, Pr. Ch. 24; Ainslie v. Medlicot, 13 Ves. 266; Higginson v. Wilson, 11 Jur. 1061. The party who desires the wife to put in a separate answer must apply for leave; the husband if he seek to be relieved from a joint answer; the wife if she desire for any cause to answer separately; and the complainant if he requires a discovery from her irrespective of her husband. Toole v. De Kay, 4 Sandf. Ch. 385; Wybourn v. Blunt, Dick. 155; Travers v. Bulkley, 1 Ves. Sr. 388; *Ex parte* Halsam, 2 Atk. 50. The application should be made on notice. Garey v. Whittingham, 1 Sim. 163; Hoffman's Ch. Pr. (2d ed.) 280.

<sup>1</sup> Collard v. Smith, 13 N. J. Eq. 43; Perine v. Swaine, 1 Johns. Ch. 24.

<sup>2</sup> Collard v. Smith, 13 N. J. Eq. 43,

45, where on motion to suppress a separate answer of the husband the court said:—"It was urged, upon the argument, that the only remedy of the complainant is to proceed against the husband for a contempt. This course may be adopted to compel the answer by the wife, but the separate answer of the husband will also be ordered to be suppressed and taken off the file." Collard v. Smith (1860), 13 N. J. Eq. 43, 46.

<sup>3</sup> Toole v. De Kay, 4 Sandf. Ch. 385. The wife is not bound to answer a bill of discovery as to matters in which she has no personal interest. City Bank v. Bangs, 3 Paige, 36. The rule is that if the husband and wife join in an answer as co-defendants, it will be considered as the defense of the husband alone, and it will not affect a future claim by the wife in respect of her separate estate. Bird v. Davis, 14 N. J. Eq. 469.

<sup>4</sup> 1 Barbour's Ch. Pr. (2d ed.) 158.

<sup>5</sup> Van Wyck v. Norvell, 2 Humph. 193; McLard v. Linnville, 10 Humph. 164; Lindsley v. James, 3 Cold. (Tenn.) 487; Woodfork v. Bank, 3 Cold.

without a seal, it was suppressed on motion, though the secretary made affidavit that the company had no corporate seal.<sup>1</sup> But if any seal whatever is attached to the answer by the authority of the corporation it becomes their seal, and if the answer is verified in usual form by the signature of an officer of the corporation, and was affixed by authority of the corporation, the answer upon its face purports to be and is under the corporate seal.<sup>2</sup> When a change occurs in the officers of a corporation between the time it is brought into court and the time when its answer is filed, the answer must be filed by the persons who are officers at the time of the filing.<sup>3</sup>

§ 352. Joinder of several defenses.—A defendant may demur to one part of the bill, or put in separate and distinct

(Tenn.) 497; *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 600; *Fulton Bank v. New York &c. Canal Co.*, 1 Paige, 811; *Maryland &c. Coal & Iron Co. v. Wright*, 8 Gill, 170, 174; *Bouldin v. Mayor*, 15 Md. 21. But see *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185; *Salmon v. Clagett*, 3 Bland, 125, 165. Although a corporation cannot be compelled to answer under oath it can be required to answer, and must answer fully. *Gamewell Fire-alarm Tel. Co. v. Mayor &c.*, 31 Fed. Rep. 812; *Colgate v. Compagnie Francaise*, 23 Fed. Rep. 82; *Kittredge v. Claremont Bank*, 1 Woodb. & M. 244; *Reed v. Cumberland Mut. Ins. Co.*, 86 N. J. Eq. 393. Where stockholders not made defendants by the bill were permitted, by leave of court, to appear and put in answers in the name of the company, defendant, such answers cannot be regarded as the answers of the corporate body, but may be regarded as those of the individual stockholders. *Bronson v. La Crosse &c. R. Co.*, 2 Wall. 83. Upon the answer of the officers or agents of a corporation who are made co-defendants in a suit against the cor-

poration, for the purpose of discovery, no decree for relief can be founded, either as against them or the corporation. *Vermilyea v. Fulton Bank*, 1 Paige, 87. Where a bill was filed against a corporation generally, who put in an answer under their corporate seal, the court refused on motion to order certain officers of the corporation to make oath to the answer so filed. *Brumly v. Westchester Mfg. Soc.*, 1 Johns. Ch. 366. See, also, *Ellsworth v. Curtis*, 10 Paige, 105.

<sup>1</sup>*Ransom v. Stonington Savings Bank*, 13 N. J. Eq. 212, holding that if the seal is dispensed with, it should be by leave of the court previously obtained, and for good cause shown.

<sup>2</sup>*Ransom v. Stonington Savings Bank*, 13 N. J. Eq. 212, 213.

<sup>3</sup>*Mechanics' Nat. Bank v. Burnett Mfg. Co.*, 32 N. J. Eq. 236. In a suit against a corporation joining its officers as co-defendants for the purpose of discovery the corporation should be permitted to put in a separate answer, in order that it may, if so inclined, make offers and admissions, and deny facts which the officers may suppose to exist. *Vermilyea v. Fulton Bank*, 1 Paige, 87.

demurrers to separate and distinct parts of the same bill, plead to another part, answer to another, and disclaim as to another.<sup>1</sup> "All these defenses must clearly refer to separate and distinct parts of the bill; for a defendant cannot plead to that part to which he has already demurred; neither can he answer to any part to which he has either demurred or pleaded;<sup>2</sup> the demurrer demanding the judgment of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea. Nor can the defendant by answer claim what by disclaimer he has declared he has no right to. A plea or answer will therefore overrule a demurrer, and an answer a plea; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer."<sup>3</sup> When a demurrer is to part only of the bill, and is accompanied by an answer or other defense to the residue, it should be entitled, "The demurrer of A. B., the above-named defendant, to part of the bill, and the answer of the said defendant to the remainder of the bill of complaint of the above-named plaintiff."<sup>4</sup> The same rule is applicable to cases where the defense is partly by plea and partly by answer; except in those cases where the answer is in support of the plea, and then the title is properly, "The plea and answer."<sup>5</sup>

**§ 353. Frame of answer.**—An answer is headed by a title as follows:—"The answer of C. D., the defendant, to the bill of complaint of A. B., the complainant."<sup>6</sup> If the bill has been

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 787; *North v. Earl of Strafford*, 8 P. Wms. 148.

<sup>2</sup> See, however, *United States Equity Rule* 87.

<sup>3</sup> Mitford's Eq. Pl. 258.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 788; *Tomlinson v. Swinnestod*, 1 Keen, 9, 18.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 788, 789.

<sup>6</sup> Daniell's Ch. Pr. (5th ed.) 781; 1 Barbour's Ch. Pr (2d ed.) 140. If the name of the plaintiff as stated in the

caption is not the name in the bill, it will be treated as no answer, but may be taken off the file upon motion, corrected and resworn. *Griffiths v. Wood*, 11 Ves. 61. See, also, *Fry v. Mantell*, 4 Beav. 485; *Upton v. Sowten*, 12 Sim. 45. In *Pieters v. Thompson*, G. Coop. 249, an answer was taken from the files, on motion, for omission of the words "to the bill of complaint of." For form of motion see *Griffiths v. Wood*, 11 Ves. 62, 64.

amended after answer the heading states that the answer is "to the amended bill of complaint of the above-named plaintiff."<sup>1</sup> If two or more defendants join in the same answer it is headed:—"The joint and several answer,"<sup>2</sup> unless it be the answer of a man and his wife, in which case it is called "the joint answer."<sup>3</sup> If a female defendant has married since the filing of the bill, but before answering, she must either obtain an order for leave to answer separately, or answer jointly with her husband, who, although not named on the record as a defendant, may join in the answer, in which case the answer should be headed:—"The answer of A. B. and C., his wife, lately and in the bill called C. D., spinster" (or widow, as the case may be).<sup>4</sup> If the answer is joined with another pleading it should be headed:—"The demurrer, plea and answer of," etc. And if put in by a guardian or next friend, "A. B., by C. D., his next friend."<sup>5</sup> After the title the answer proceeds to reserve to the defendant all advantages which might be taken by exception to the bill; but this form is unnecessary.<sup>6</sup> Then follows the substance of the answer;<sup>7</sup> concluding with a general traverse or denial of the unlawful combination charged in the bill and of all other matters therein contained.<sup>8</sup>

**§ 354. Status of answer upon removal to federal courts.—** If the chancery rules of a State court provide that it may

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 781; *Rigby v. Rigby*, 9 Beav. 811, 818.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 781. It may, however, be put in as a joint answer only. *Davis v. Davidson*, 4 McLean, 186.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 781. "When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master upon reference to him shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together." United States Equity Rule 62.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 781.

<sup>5</sup> 1 Foster's Federal Practice (2d ed.), 261.

<sup>6</sup> Story's Equity Pleading (10th ed.), § 870. This general reservation is omitted in the answer of an infant by his guardian. Story's Equity Pleading (10th ed.), § 871. See, also, United States Equity Rules 39, 44.

<sup>7</sup> No particular form of words is necessary provided the substance is preserved and there is no pretense that the answer is evasive. *Utica Ins. Co. v. Lynch*, 8 Paige, 210.

<sup>8</sup> But an answer will not be suppressed for the omission of such a traverse, nor is it inserted in the answer of an infant. Story's Equity Pleading (10th ed.), §§ 870, 871.

give relief to a defendant setting up by answer the facts upon which his equity rests to the same extent that relief might have been had on a cross-bill, the defendant need not, upon the removal of the cause to a federal court after such an answer has been filed, re-frame his pleadings to conform to the federal equity practice, unless by filing a cross-bill setting up the same facts and praying for relief thereon.<sup>1</sup>

§ 355. **Signature to answer.**—It is a general rule that an answer must be signed by counsel.<sup>2</sup> But in several jurisdictions the signature of a solicitor is sufficient.<sup>3</sup> An answer must also be signed by the defendant or defendants putting it in.<sup>4</sup> The answer of the defendant must be actually signed by him, although an answer is waived, unless a special order of the court has been obtained allowing him to put in his answer without signature.<sup>5</sup> But if the complainant files a replica-

<sup>1</sup> *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. Rep. 569, 575, where Taft, J., said:—"Our conclusion is not based upon the case of *Kingsbury v. Buckner*, 134 U. S. 650; 10 S. Ct. Rep. 688, because an examination of that case shows that the peculiar equity practice in reference to cross-bills in Illinois referred to there occurred in a case tried in the State court, and that the decree in the case was only under collateral examination, and the case was not directly before the federal court on removal. Our conclusion is based on the language of the removal statute and the anxiety of the federal courts to preserve the rights of parties on removal exactly as they existed in the State court so far as this is possible and consistent with the federal statutes and constitution." See *Brande v. Gilchrist*, 18 Fed. Rep. 465.

<sup>2</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 732; *Dennison v. Bassford*, 7 Paige, 370. In Alabama an answer need not be signed by counsel. "In this State," said the court, "every person has the right to prosecute or defend any suit

in favor of or against himself either by himself or by counsel; he is not compelled by law to employ counsel to conduct his suit, but may appear himself before any court and prosecute or defend in *propria persona*." *May v. Williams*, 17 Ala. 28.

<sup>3</sup> *Henry v. Gregory*, 29 Mich. 68; 1 *Hicks' Man. Ch. Pr.* 46, 183 (Tenn.); *Puterb. Ch. Pr.* 59, 601 (Ill.). See also, *Stradler v. Hertz*, 13 Lea (Tenn.), 315. A New Jersey chancery rule providing that "every bill shall be signed by counsel" does not extend to answers; and an answer signed by a solicitor will not be taken from the files because not signed by counsel. *Freehold Mut. L. Ass'n v. Brown*, 28 N. J. Eq. 42; *Dickerson v. Hodges*, 48 N. J. Eq. 45, 46; s. c., 10 Atl. Rep. 111, holding a signature by solicitor or defendant sufficient. A signature in the firm name of two counselors in partnership would be sufficient. *Hampton v. Coddington*, 26 N. J. Eq. 557.

<sup>4</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 732.

<sup>5</sup> *Dennison v. Bassford*, 7 Paige, 370; *Kimball v. Ward*, Walk. Ch.

tion it is a waiver of the omission of the defendant's signature.<sup>1</sup>

§ 356. Answer under oath — Waiver of oath.— Where the defendant is not exempted from taking an oath by statute, and is not a corporation aggregate or entitled to the privilege of peerage, his answer must be put in upon oath.<sup>2</sup> But the answer of a defendant may be received by consent without oath.<sup>3</sup> An order of court, however, is necessary for that purpose, which seems to be a matter of course where the parties agree,<sup>4</sup> and may be obtained upon motion,<sup>5</sup> but is usually obtained upon petition.<sup>6</sup> If the answer is to be put in without

439; *Bayley v. De Walkers*, 10 Ves. 441. "Such order appears to be necessary even where both parties consent by their solicitors that the answer may be put in without the signature of the defendant. And to obtain such an order where the defendant is abroad, the court requires his written consent, or the evidence of a power from the defendant to his attorney, or solicitor, to put in an answer for him. *Codner v. Hersey*, 18 Ves. 468. The practice of requiring an order, founded upon evidence of authority to appear for the defendant, even where the complainant consented that the answer should be taken without oath or signature, was sanctioned by Chancellor Kent in *Dumond v. Magee*, 2 Johns. Ch. 240. See, also, *Hoff*, Ch. Pr. 229. And the putting in of an answer without oath or signature by a person who appeared as her solicitor was considered as irregular by several members of the court for the correction of errors in the case of *Rogers v. Cruger*, 7 Johns. 558." *Dennison v. Bassford*, 7 Paige, 870. See, also, *Anon. v. Lake*, 6 Ves. 171; *Anon. v. Gwillim*, 6 Ves. 171.

<sup>1</sup> *Fulton Bank v. Beach*, 2 Paige, 307. See, also, *Stadler v. Hertz*, 18 Lea (Tenn.), 315. Nor can the omis-

sion affect the validity of a decree. *Sears v. Hyer*, 1 Paige, 483. "Although the bill waives an answer under oath the answer should be signed by the defendant; but the irregularity of omitting the signature will be waived by the filing of a replication, or, what is equivalent under our statute, dispensing with a replication by failing to except to the answer within the time allowed by statute." *Jones v. Carper*, 2 Tenn. Ch. 627; *Wilson v. Wilson*, 2 Lea, 18; *Cook v. Dewa*, 2 Tenn. Ch. 496. See *Smith v. St. Louis Mut. Ins. Co.*, 2 Tenn. Ch. 599.

<sup>2</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 734, 735. "An answer put in without oath is not for any purpose evidence in the cause, but performs the office of pleading only. It proves nothing which it alleges, and the only purpose which it serves is to assist in making up the issues." *Willis v. Henderson*, 5 Ill. (4 Scam.) 18, 20; *Guthrie v. Quinn*, 43 Ala. 56. But see *Curling v. Townshend*, 19 Ves. 628, 630.

<sup>3</sup> *Billingslea v. Gilbert*, 1 Bland, 566.

<sup>4</sup> *Fulton Bank v. Beach*, 2 Paige, 307; s. c., 6 Wend. 86; *Billingslea v. Gilbert*, 1 Bland, 567.

<sup>5</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 736.

<sup>6</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 736.



oath and the plaintiff applies for the order, no consent is necessary; but if the defendant applies, the plaintiff's solicitor must instruct counsel to consent to the motion or must subscribe his own consent to the petition, as the case may be.<sup>1</sup> "The consent of the plaintiff must be expressly given in writing by himself or his solicitor, or it must be shown as a necessary inference from some act of his which clearly implies that he knew the paper purporting to be an answer not sworn to had been filed."<sup>2</sup> An answer purporting to be the answer of all of three defendants, but signed and sworn to by only two of them, is irregular, and although the complainant may reply to it and thereby waive the irregularity,<sup>3</sup> he may have it stricken off the files.<sup>4</sup> In many jurisdictions statutes or rules of court authorize an express waiver of the oath by the complainant in his bill, in which case the answer is regarded only as a pleading.<sup>5</sup> Under such a provision it has been held that the complainant must waive an answer on oath as to every portion of the bill or to no part thereof, and that after a defendant has put in an answer on oath as to the whole or any part of the bill, it is too late for the complainant to get rid of

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 786.

<sup>2</sup> Billingslea v. Gilbert, 1 Bland, 566, where it was held that, if the plaintiff appears on the notice of motion to dissolve an injunction and opposes it without objecting to the answer on account of its not being sworn to, he will be precluded from making the objection at any time thereafter.

<sup>3</sup> Freeland v. Royall, 2 Hen. & Munf. 575; Fulton Bank v. Beach, 2 Paige, 807; and the last note to the preceding section. But see Nesbitt v. Dellam, 7 Gill & J. 494.

<sup>4</sup> Bailey Washing Machine Co. v. Young, 12 Blatchf. 199; Fulton Bank v. Beach, 2 Paige, 807; s. c., 6 Wend. 36; Rogers v. Cruger, 7 Johns. 557; Denison v. Bassford, 7 Paige, 870; Cook v. Westall, 1 Madd. Ch. 265; Cope v. Parry, 1 Madd. Ch. 83; Bayley v. De Walkiers, 10 Ves. 441; Pincers v. Robertson, 24 N. J. Eq.

848; Binney's Case, 2 Bland (Md.), 99, 109, citing Harris v. James, 8 Bro. C. C. 899; Done v. Read, 2 Ves. & B. 810; Cooke v. Westall, 1 Madd. 265; Cope v. Parry, 1 Madd. 83; Griffith v. Wood, 11 Ves. 62; Pieters v. Thompson, Coop. Rep. 249.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 784, n. 7; Winsor v. Bailey, 55 N. H. 218; Ayer v. Messer, 59 N. H. 279. But it is the settled rule of equity practice where there is no regulation to the contrary, that the complainant cannot by waiving an answer under oath deprive the defendant of the benefit of an answer under oath as evidence if he chooses so to answer. Clements v. Moore, 6 Wall. 299. See, also, Armstrong v. Scott, 8 G. Greene, 433; Brown v. Bulkley, 14 N. J. Eq. 294, 306; Conley v. Nailor, 118 U. S. 127; Armory v. Lawrence, 3 Cliff. 523, 537; Woodruff v. Dubuque & Co. R. Co., 30 Fed. Rep. 91.



a denial upon oath of all or any of the matters of the bill. An amendment in that stage of the suit waiving an answer on oath is irregular and cannot be allowed. If the complainant can establish his case without a discovery from the defendant, and he is unwilling to rely upon the answer as made upon oath, his only remedy is to dismiss the bill and commence a new suit in which he may waive an answer on oath.<sup>1</sup>

§ 357. **Before whom answer to be sworn.**—According to the former English practice it seems to have been necessary for the defendant to appear in person and swear to his answer before one of the masters in chancery.<sup>2</sup> Now, however, an answer may be filed without any further or other formality than is required in the swearing and filing of an affidavit.<sup>3</sup> The matter is generally regulated by statute or rules of court. In Maryland an affidavit verifying the truth of an answer, made before a magistrate duly authorized to administer an oath in the country where the defendant resides, has long been admitted as sufficient.<sup>4</sup> Where an answer is verified by the defendant upon oath administered by a notary public as shown by his notarial certificate, and is received without exception in the court of first instance, an objection to the competency of a notary to administer an oath in such case will not be entertained on appeal.<sup>5</sup> A United States rule in

<sup>1</sup> *Burras v. Looker*, 4 Paige, 227. A United States rule in equity (amendment of December, 1871, to rule 41) provides that, "if the complainant in his bill shall waive an answer under oath or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit with the same effect as heretofore upon a motion to grant or dissolve an injunction, or on any other incidental motion in the cause;

but this shall not prevent a defendant from becoming a witness in his own behalf under section 8 of the act of congress of July 2, 1864." See *Dravo v. Fabel*, 132 U. S. 487; *Conley v. Nailor*, 118 U. S. 127, 134.

<sup>2</sup> *Snowden v. Snowden*, 1 Bland, 550.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 748, 744. See, also, *Snowden v. Snowden*, 1 Bland, 550; *Marlbrough v. Marlborough*, 1 Dick. 74; *Jougema v. Pfiel*, 9 Ves. 357; *Tappan v. Norman*, 11 Ves. 568.

<sup>4</sup> *Gibson v. Tilton*, 1 Bland, 852, 854.

<sup>5</sup> *Hogan v. Branch Bank*, 10 Ala. 485. The same rule applies where there is no verification whatever.

equity declares that "every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public."<sup>1</sup>

**§ 358. Mode of administering oath.**—The oath, when administered to a person professing the Christian religion, is upon the Holy Evangelists, the party holding the book in his right hand, the hand being uncovered, and in case of a male person the head being uncovered also.<sup>2</sup> A Jew may be sworn upon the Pentateuch, with his hat on.<sup>3</sup> A heathen may be sworn in the manner most binding on his conscience. In a case where the defendant to a cross-bill was resident in the East Indies and professed the Gentoo religion, the court directed a commission to the East Indies and empowered the commissioners to administer the oath in a manner which should seem to them the most solemn; and if they administered any other oath than the Christian, to certify to the court what was done by them.<sup>4</sup> A Quaker is allowed to put in his answer upon his solemn affirmation and declaration.<sup>5</sup>

*Nesbitt v. Dallam*, 7 Gill & J. 494, 510. See, also, *Findlay v. Hinde*, 1 Peters, 241.

<sup>1</sup> Equity Rule 59, as amended in October term, 1888, 129 U. S. 701.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 785, n. 4; Braithwaite's Pr. 848.

<sup>3</sup> *Hinde*, 228. See, however, *Tryatt v. Lindo*, 3 Edw. Ch. 239 241, n.

<sup>4</sup> *Omychund v. Barker*, 1 Atk. 31, 48. The form of the oath or affirmation administered to a defendant is given in Daniell's Chancery Practice as follows:—"You swear (or solemnly affirm) that what is contained in this, your answer (or plea and answer), as far as concerns your own act and deed, is true to your own knowledge, and that what relates to

the act and deed of any other person or persons you believe to be true." Story's Equity Pleading (10th ed.), 878, n. 8. If an affidavit, though not as full and exact as it might have been, is expressed in terms sufficiently clear and strong to sustain a prosecution for perjury, it would seem to be sufficient. *Gibson v. Tilton*, 1 Bland, 852, 855.

<sup>5</sup> Cooper's Eq. Pl. 325, 326; Story's Equity Pleading (10th ed.), § 874. United States Rule 91 in Equity provides that the defendant may, "if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him."

§ 359. **Jurat.**— The substance of the oath administered to the defendant on swearing to his answer must be stated in the jurat or certificate of the officer.<sup>1</sup> Where the rule required the “matters” stated in the answer to be sworn to, a jurat stating that the “facts” in the answer were sworn to was held sufficient.<sup>2</sup> If there are many defendants who are sworn at the same time, one jurat will be sufficient. But if the defendants are sworn at different times, there must be separate jurats for each defendant or each set of defendants swearing.<sup>3</sup> A jurat may properly be in the past tense, certifying that the defendant appeared before him at the time therein specified, and swore that the facts stated in the answer were true; that is, that they were then true.<sup>4</sup> A jurat is not rendered defective by the want of the statement of the county where the bill was sworn to, the legal presumption being that the officer has not violated his duty by administering the oath outside of his county.<sup>5</sup> The jurat to the answer of a Jew was in the ordinary form, the commissioner certifying that the defendant had been “duly sworn.” In the absence of affidavits to the contrary it was presumed to be a sufficient compliance with the statute requiring such person to be sworn according to his creed.<sup>6</sup>

<sup>1</sup> Hinde's Ch. 227. An answer, with the draft of an affidavit appended to it, signed by the defendant, but without authentication of the jurat by an officer authorized to administer an oath, will be as no answer to a bill requiring answer under oath. *Westerfield v. Bried*, 26 N. J. Eq. 357. Where the jurat to the answer is defective, and the defendant has leave to amend by adding a proper jurat to the answer on file, the amendment is not complete until a copy of the amended jurat is served on the complainant's solicitor. *Taylor v. Bogert*, 5 Paige, 83. But if an answer on oath is not waived by the complainant, and there is no jurat to the copy of the

answer served, though the original is sworn to, if the complainant files a replication and goes to a hearing without objection the irregularity is waived. *Reed v. Warner*, 5 Paige, 650.

<sup>2</sup> *Whelpley v. Van Epps*, 9 Paige, 382.

<sup>3</sup> 1 Daniell's Ch. Pr. (5th ed.) 746.

<sup>4</sup> *Whelpley v. Van Epps*, 9 Paige, 382.

<sup>5</sup> *Barnard v. Darling*, 1 Barb. Ch. 218. Where the official character of a notary who signed the jurat was contained in the body of it, but was not annexed to his signature, it was held sufficient. *Feuchtwanger v. McCool*, 29 N. J. Eq. 151.

<sup>6</sup> *Tryatt v. Lindo*, 3 Edw. Ch. 289.

§ 360. **The same subject continued — Defendant's signature.**— Where the verification of an answer is in the form of an affidavit, the name of the deponent should be subscribed at the foot of the affidavit; and where the verification is in the form of a certificate of the officer who administered the oath, the name of the deponent should be subscribed to the answer. The object is to facilitate identification of the affiant in case of prosecution for perjury.<sup>1</sup>

§ 361. **Service of answer.**— Where an answer was served during the absence of the complainant's solicitor from his office by delivering such answer to the clerk at the door of the office as he was about to open and enter the office, and such clerk immediately afterwards opened and entered the office, and took the answer in with him, it was held to be a good service, although the clerk was not actually in the office when the answer was delivered to him.<sup>2</sup> A party has a right to presume that the pleading served on him is a correct copy of the one on file; and when the copy of an answer served contains neither the signature of solicitor or counsel, or if it has no jurat annexed, the complainant may apply to take the answer off the files for irregularity. But where the answer actually filed was correct, the defendant was allowed to serve a perfect copy thereof upon payment of the costs occasioned by the irregularity.<sup>3</sup> It is not absolutely necessary that a paper should be filed at the moment the copy thereof is served, provided it is filed the same day, unless some proceeding has been taken in the meantime to render such subsequent filing improper. But the service of a paper is not perfect until the originally is actually delivered to the proper officer to be filed.<sup>4</sup> Where an answer duly sworn to was filed to a

<sup>1</sup> *Pincers v. Robertson* (1874), 24 N. J. Eq. 848; *Hathaway v. Scott*, 11 Paige, 178, 176; *Anderson v. Stather*, 9 Jur. 1085; 1 Daniell's Ch. Pr. (5th ed.) 746.

<sup>2</sup> *Quincy v. Foot*, 1 Barb. Ch. 496.

<sup>3</sup> *Littlejohn v. Munn*, 8 Paige, 280. A complainant who is served with an answer accompanied with payment of costs, as a condition of being

permitted to answer, cannot return the answer as served too late, without also returning the costs so paid. *Hoxie v. Scott*, Clarke's Ch. 457.

<sup>4</sup> *Quincy v. Foot*, 1 Barb. Ch. 496. A right which a solicitor has for his client under any rule or practice can be waived by parol. A solicitor, therefore, who waived his right to a copy of an answer by parol is bound

petition, and it appeared from the decree appealed from that the answer was read at the hearing, no objection appearing to have been made thereto, the court presumed that the answer was regularly served as an affidavit, or that service was waived.<sup>1</sup>

**§ 362. Filing an answer — Further time.**— When the last day for filing an answer falls on a legal holiday, it may be filed on the next day that the clerk's office is open.<sup>2</sup> Where a suit has been stayed until the complainant shall give security for costs, which he accordingly does, the time within which the defendant may properly file his answer does not begin to run until he has notice that the security has been filed.<sup>3</sup> The court will permit a complainant to file an answer after the time limited in an order to file it if the omission is satisfactorily explained.<sup>4</sup> An answer filed by one of several judg-

thereby and cannot afterwards raise the objection of a want of service of a copy. *People v. Wyckoff*, 2 Edw. Ch. 516. A defendant, after the time for answering had expired, may serve an answer at any time before an order to take the bill as confessed is actually entered with the clerk. *Hoxie v. Scott*, Clarke's Ch. 457.

<sup>1</sup> *Phil. & Reading R. Co. v. Little*, 41 N. J. Eq. 520.

<sup>2</sup> *Feuchtwanger v. McCool*, 29 N. J. Eq. 151.

<sup>3</sup> *Southern Nat. Bank v. Darling*, 49 N. J. Eq. 898, vacating a decree *pro confesso* on the ground that in conformity with the rule stated in the text the defendant's answer was filed in time — at the cost of the complainant, including the cost of the defendant's application.

<sup>4</sup> *Short v. May*, 2 Sandf. Ch. 639, where a copy was inadvertently filed instead of the original; *Lindsey v. Stevens*, 5 Dana, 104. An answer pleading a general denial to amendments to a petition in equity filed six months after the amendments are made, but before the cause is finally

submitted, is properly received, in the discretion of the court. *Kehoe v. Carville* (Iowa), 51 N. W. Rep. 166. If leave is asked to file an answer in a suit foreclosing a railroad mortgage long after the answer should have been filed in the course of orderly practice, cause for the delay must be shown. *Central Trust Co. v. Texas & C. Ry. Co.*, 28 Fed. Rep. 846. On the return day of the summons defendant was ruled to answer on the third day of the term. On that day the rule was vacated, leave to amend the bill was granted, and defendant was ruled to answer the amended bill on the fifth day of the term. The record did not show any amendment to the bill. On the fourth day of the term defendant was defaulted for failure to "answer under the rule," and a decree was entered against him on evidence taken before a master, though the record did not show any order of reference. It was held that defendant had not had a proper opportunity to defend. *Walters v. Walters*, 132 Ill. 467; s. c., 28 N. E. Rep. 1120. Under Code of Vir-

ment creditors, joining with him therein his co-plaintiffs in the judgment, filed in time as to himself but out of time as to them, sworn to by him but not by them, was permitted to stand as filed in time by him and as his answer, though purporting to be the answer of his co-plaintiffs also.<sup>1</sup> The motion for an order for time to answer is strictly a special motion, and regularly should be heard only upon notice, and be sustained by affidavits or other proof,<sup>2</sup> and the decision thereon should appear in the record.<sup>3</sup> Where the plaintiff proceeds to a hearing on his supplemental bill and the answer thereto, it is a waiver of the objection that the answer was not filed in conformity to the rules in point of time.<sup>4</sup>

**§ 363. Answer after expiration of time.**— Where a defendant answers by favor of the court, as, for instance, upon permission granted after the regular time has expired, he must be restricted to an equitable answer; where he has a right to answer no such limitation can be imposed.<sup>5</sup> Thus it is the

ginia, 1878, chapter 167, section 85, providing that a defendant may file an answer in a chancery cause at any time before final decree, a defendant for whom in his absence his counsel have filed an incomplete, irregular and unsworn answer, which is in fact no answer, can file a full and complete answer. *Radford v. Fowlkes*, 85 Va. 820; s. c., 8 S. E. Rep. 817. An answer cannot be filed after the prescribed time merely because the complainant has not availed himself of his right to take the bill as confessed. *Allen v. Mayor*, 7 Fed. Rep. 488.

<sup>1</sup> *Young v. Clarksville Mfg. Co.*, 27 N. J. Eq. 67; *Done v. Read*, 2 Ves. & B. 810.

<sup>2</sup> *Emery v. Downing*, 18 N. J. Eq. 59, 61, where, however, it was said that as a matter of convenience such orders are commonly granted without notice and upon the mere allegation of counsel.

<sup>3</sup> *Lindsey v. Stevens*, 5 Dana, 104.

Where a demurrer is overruled upon argument, and the defendant is ordered to put in his answer within a specified time, and further time is desired, the proper course is to apply to the court to extend the time, and to give notice of such application to the complainant's solicitor; or to obtain an order to show cause why the time to answer should not be extended, and to stay the proceedings of the complainant in the meantime if necessary. *Hurd v. Haynes*, 9 Paige, 604. By the Irish practice a notice of an application for time to answer, and an affidavit filed in support of it, prevent all further proceedings by the complainant until the motion is disposed of by the court. *Ormsby v. Palmer*, 1 Hogan, 191.

<sup>4</sup> *Perkins v. Hendryx*, 81 Fed. Rep. 522.

<sup>5</sup> *Vanderveer v. Holcomb*, 32 N. J. Eq. 555.

rule in New Jersey that the time for answering will not be extended in order to admit the defense of usury.<sup>1</sup> And an order extending the time, without notice to the complainant and without qualification, was afterwards modified so as to exclude that defense.<sup>2</sup> So where the defendants obtained an extension of time to answer on an *ex parte* application, after the expiration of the time limited by law for answering, and in their answer they set up usury, it was ordered that so much of the answer as set up usury be struck out, or that the defendants introduce into the answer an offer to pay the principal actually received, with lawful interest.<sup>3</sup> If the complainant grants an extension of time before the defendant is in laches the defense of usury will be permitted, but not when the defendant was already in default.<sup>4</sup>

§ 364. Taking answers off the file.— If an answer is not properly entitled,<sup>5</sup> or is not signed and verified,<sup>6</sup> or is filed by a stranger to the record,<sup>7</sup> or is filed too late,<sup>8</sup> or is so evasive

<sup>1</sup> Collard v. Smith, 18 N. J. Eq. 43.

<sup>2</sup> Collard v. Smith, 18 N. J. Eq. 43. "The custom of chancery is not to allow a defendant who has permitted his time to answer to pass by additional time to answer in order to set up usury; much less will it do so when the cause has regularly progressed upon pleadings and proofs to a final hearing." *Campion v. Kille*, 15 N. J. Eq. 476, 478.

<sup>3</sup> Hill v. Colie, 25 N. J. Eq. 469; *Remer v. Shaw*, 8 N. J. Eq. 355. See, however, *Corning v. Ludlum*, 28 N. J. Eq. 398, where, on motion to open a decree and allow the defendant to plead usury, the court said that "the defense of usury under the existing law of this State is not unconscientious," declaring the rule to be otherwise in respect of usury by the law of another State. Consult, also, *Gilchrist v. Gilchrist*, 44 How. Pr. (N. Y.) 317; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Wagner v. Blanchet*, 27 N. J. Eq. 356.

<sup>4</sup> Collard v. Smith, 18 N. J. Eq. 43.

<sup>5</sup> *Fulton County v. Miss. &c. R. Co.*, 21 Ill. 338, 367; *Griffiths v. Wood*, 11 Ves. 61. It is not good cause to strike an answer off the file that it omits the name of one of the defendants in the title of the cause, nor that it is interlined in a material part, unless it appears that the interlineation was made after the answer was sworn to or some irregularity intervened. *McLure v. Colclough*, 17 Ala. 89.

<sup>6</sup> *Kimball v. Ward*, Walk. Ch. 489; *Bernier v. Bernier*, 72 Mich. 43, where the court suggested that a verification might possibly be allowed at the hearing *nunc pro tunc*. In the same case the court declined to consider the lack of a signature as a purely formal defect; it may be important both as to admissions to be used elsewhere and as to liability for scandal and impertinence.

<sup>7</sup> *Putnam v. New Albany*, 4 Biss. 365, 367.

<sup>8</sup> *Allen v. Mayor &c.*, 18 Blatchf. 239.



that it is obviously a mere delusion,<sup>1</sup> or it is in any respect irregular,<sup>2</sup> the court may upon motion of the complainant order it to be taken off the file.<sup>3</sup> But an answer duly filed will not be stricken from the files on motion, if any part of it is entitled to be regarded as an answer to any part of the bill.<sup>4</sup> It cannot be stricken out, on motion, on the ground that it admits all the equity claimed in the bill.<sup>5</sup> If the complainant waives an answer on oath, he cannot apply to have the answer taken off the files on the ground that the defendant knows it to be wholly untrue. His only remedy in such a case is, at the hearing, to ask to have the defendant charged personally with the costs to which he has improperly subjected the complainant by such false pleading.<sup>6</sup> Irregularities and defects in form are waived by filing exceptions or the general replication.<sup>7</sup>

<sup>1</sup> *Phillips v. Overton*, 4 Hayw. 292; *Travers v. Ross*, 14 N. J. Eq. 254; *Smith v. Searle*, 14 Ves. 415; *Tomlin v. Lethbridge*, 9 Ves. 178; *Lynch v. Leceue*, 1 Hare, 626, 681; *Brooks v. Purton*, 1 Y. & C. Ch. 278; *Read v. Burton*, 8 K. & J. 166; s. c., 8 Jur. (N. S.) 268. *Contra*, *Marsh v. Hunter*, 8 Mad. 487; *White v. Howard*, 2 De G. & S. 228.

<sup>2</sup> *Travers v. Ross*, 14 N. J. Eq. 254, 255; *Bailey Washing Machine Co. v. Young*, 12 Blatchf. 199. As if the jurat to an answer taken by commission fails to state where it was sworn. *Hayes v. Lequin*, 1 Hogan, 274. See, also, *New York Chem. Co. v. Flowers*, 6 Paige, 654; *American Ins. Co. v. Bayard*, 8 Barb. Ch. 610; *Perine v. Swaine*, 1 Johns. Ch. 24; *Nesbitt v. Dellam*, 7 Gill & J. 494; *Leavitt v. Cruger*, 1 Paige, 422; *M'Gowan v. Hall*, *Hayes*, 17; *Daly v. Tool*, 1 Irish Eq. 844; *Napier v. Napier*, 1 Irish Eq. 414.

<sup>3</sup> *Travers v. Ross*, 14 N. J. Eq. 254, 255.

<sup>4</sup> *Carpenter v. Gray*, 88 N. J. Eq. 185; *Travers v. Ross*, 14 N. J. Eq. 254; *Squire v. Shaw*, 24 N. J. Eq. 74. *Feuchtwanger v. McCool*, 29 N. J.

Eq. 151, 152. "The rule is that if any part of the instrument purporting to be an answer is entitled to the character of an answer, that is, if it be an answer to any material fact alleged in the bill, the court will not take it off the file but will leave the plaintiff to except to it for insufficiency." *May v. Williams*, 17 Ala. 23. In *Travers v. Ross*, 14 N. J. Eq. 254, 258, the court said:—"I find no case in this court where an answer has been suppressed or ordered to be taken from the file on the ground of its insufficiency or frivolousness, except the case of *Stout v. Evans*, decided September, 1858, which was referred to upon the argument. That case appears to have been decided upon an *ex parte* hearing, and probably under an impression that the answer was filed out of season." But possibly a demurrer might be overruled as frivolous. *Bowman v. Marshall*, 9 Paige, 78.

<sup>5</sup> *Conway v. Wilson*, 44 N. J. Eq. 457.

<sup>6</sup> *Dennison v. Bassford*, 7 Paige, 870.

<sup>7</sup> *Fulton County v. Miss. &c. R. Co.*, 21 Ill. 388, 367; *Fulton Bank v.*

§ 365. The same subject continued — Answer by defendant in contempt.— The court has power, when and while a defendant is in contempt for disobeying its orders, to refuse to hear him and to strike out his answer.<sup>1</sup> In New York this

Beach, 2 Paige, 807; Glassington v. Thwaites, 2 Russ. 458, 461; Seaton v. Grant, L. R. 2 Ch. App. 459.

<sup>1</sup> Walker v. Walker, 82 N. Y. 260, where the defendant in an action for divorce was in contempt because of disobeying an order of the court directing the payment of alimony. An order directed the payment of the sums within five days, or in default thereof that the answer be stricken out and the case proceed as if no answer had been put in. By a subsequent order the answer was struck out and a reference directed. Folger, C. J., premising that the Supreme Court on its equity side has all the power and authority that formerly existed in chancery in England and was continuously exercised by it (Manning v. Manning, 1 Johns. Ch. 527, 529), proceeded as follows:— "It is not to be denied that a court of equity may refuse to a defendant in contempt the benefit of proceedings in it, when asked by him as a favor, until he has purged himself of his contempt. See Brinkley v. Brinkley, 47 N. Y. 40, 49, and cases there cited [Ellingwood v. Stevenson, 4 Sandf. Ch. 366; Johnson v. Pinney, 1 Paige, 646; Rogers v. Patterson, 4 Paige, 450; Evans v. Van Hale, Clarke's Ch. 17]. But the rule has been held broader than that and enforced with much rigor. Chief Baron Gilbert lays it down in his Forum Romanum (p. 88) that 'if the defendant appeared before the *secundum decretum* he was liable to a mulct, for he could not be heard in the cause till he had cleared his contempt.' It is suggested in Cooper's Cases (temp. Cott. 209) that this is

merely a statement of the practice according to the canon law. But the chief baron says at another place (p. 71) that 'the answer will not be received without clearing his contempt;' and at another (p. 211):— 'So it is where a man hath a bill depending in court and falls under the displeasure of the court, and is ordered to stand committed. Here when his cause is called, if the other side insist he hath not cleared his contempt, nor actually surrendered his body to the warden of the fleet, he must do both these things before his cause can be proceeded in.' It is stated by Lord Eldon that it is a general rule that a party who has not cleared his contempt cannot be heard. Vowles v. Young, 9 Ves. Jr. 178; Anon., 15 Ves. Jr. 174. The same is said, with the addition of the words, 'in the principal case,' in 2 Com. Dig., Chancery Process, D. 8, citing Practical Register in Chancery, 217. See, also, Heyn v. Heyn, Jacobs, 49; Clark v. Dew, 1 Russ. & Myl. 103. The rule in the chancery of Ireland is stated thus:— A party in contempt will not be allowed to oppose the relief sought by the plaintiff by contradicting the allegations of the bill, or bringing forward any defense, or alleging new facts. Anon. v. Lord Gort, 1 Hogan, 77; Valle v. O'Reilly, 1 Hogan, 199. And the rule, as thus stated, is cited and approved in Mussina v. Bartlett, 8 Porter (Ala.), 277. See, also, Rutherford v. Metcalf, 3 Hayw. (Tenn.) 58, 61. And in Saylor v. Mockbie, 1 Withrow (9 Iowa), 209, 212, it is held:— That until the defendant had purged himself of contempt the court might well re-

power has not been taken away by the provisions of its Code of Civil Procedure;<sup>1</sup> but the defendant may always apply to the court and show that the order was irregularly made, or for leave to purge himself of the contempt, and be let in again to make his defense.<sup>2</sup>

(b) ANSWER AS EVIDENCE.

§ 366. General statement of the rule.—The following rule is stated by Judge Story:—"An answer which contains facts which are not responsive to any allegations or interrogatories in the bill is not evidence for the defendant; but the facts must be established by independent proof. It is otherwise

fuse to receive his answer to the complainant's bill, or to consider the matter set up by way of excuse for refusal to obey the order. The Reporter (Coop. Temp. Cott. at page 211) cites in a note the case of *Anon. v. Lord Gort*, *supra*, and says of it:—"The accuracy of some of these dicta may be doubted." He does not state as to which of them he queries. Many cases are collected in the note above mentioned. Some of them show that the rule has not been rigorously applied in later times (see *King v. Bryant*, 8 Myl. & Cr. 191, especially); but it does not appear that it has been abolished or abandoned entirely. It seems, too, that the authors of the Revised Statutes thought that this power resided in the English court of chancery. In preparing the sections relative to the production and discovery of books and papers (2 R. S. 199, §§ 21 *et seq.*) they provided (§ 26) that in case of a party neglecting or refusing to obey an order, the court might strike out his plea and debar him from a defense; and they sought thus to assimilate the practice to that of the court of chancery. See reviser's note 5 Edm. Stat. 411. The legislature gave its sanction to the proposed

practice by passing into law the sections reported by the reviser. It is well to say here that *Rice v. Ehle*, 55 N. Y. 518, does not condemn this. That case holds that the pleading may not be stricken out save on notice to the party (p. 523); and that the exercise of this power was legitimate was recognized by Marcy, J., in *Birdsall v. Pixley*, 4 Wend. 196. The power seems to have been exerted or recognized by the Supreme Court in several instances, without question made by appeal. *Farnham v. Farnham*, 9 How. Pr. 231; *Barker v. Barker*, 15 How. Pr. 568; *Ford v. Ford*, 41 How. Pr. 169. We are brought to the conclusion that there has long been exerted by the court of chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the courts of chancery of this country." *Wayland v. Tysen*, 45 N. Y. 282, and *Thompson v. Erie Railway*, 45 N. Y. 471, were distinguished because neither was a case of contempt nor an equity case.

<sup>1</sup> *Brisbane v. Brisbane*, 34 Hun, 339.

<sup>2</sup> *Walker v. Walker*, 82 N. Y. 260, 264; *Brinkley v. Brinkley*, 47 N. Y. 40.

where the answer is responsive to the bill; for in such a case it is evidence for the defendant, and the plaintiff must overcome it by the counter evidence of two witnesses or of one witness and strong circumstances in corroboration, otherwise it will prevail.”<sup>1</sup>

**§ 367. Hearing upon bill, answer and replication.—** Where a cause goes to hearing on bill, answer and replication, such parts of the answer as are responsive are to be taken as true; but such parts as tend to constitute a defense by way

<sup>1</sup>Story's Equity Pleading (10th ed.), § 849a. The amount of evidence requisite to overcome a sworn and responsive answer is stated in substantially the same language in the following cases:—Vandergrift v. Herbert, 18 N. J. Eq. 466; Force v. Dutcher, 18 N. J. Eq. 401; Bird v. Styles, 18 N. J. Eq. 297; Calkins v. Landis, 21 N. J. Eq. 138; Zane v. Cawley, 21 N. J. Eq. 180; De Hart v. Baird, 19 N. J. Eq. 423; Wilson v. Cobb, 28 N. J. Eq. 177; Stearns v. Stearns, 23 N. J. Eq. 167; Commercial Bank v. Reckless, 6 N. J. Eq. 650; Chance v. Teeple, 4 N. J. Eq. 178; Neville v. Demeritt, 2 N. J. Eq. 321; Stafford v. Bryan, 1 Paige, 289; Smith v. Clark, 4 Paige, 368; Smith v. Brush, 1 Johns. Ch. 459; Tobey v. Leonard, 2 Wall. 423; Carpenter v. Providence Washington Ins. Co., 4 How. 185; Union Bank v. Geary, 5 Peters, 99, 111; Hughes v. Blake, 6 Wheat. 453; Lenox v. Prout, 3 Wheat. 520; Seitz v. Mitchell, 94 U. S. 580; Voorhees v. Bonesteel, 16 Wall. 16; Kunia v. Smith, 8 N. J. Eq. 14; Stevens v. Post, 12 N. J. Eq. 408, 415; Smith v. Potter, 3 Wis. 432; Walton v. Cody, 1 Wis. 420; Appeal of Rowley, 115 Pa. St. 150; Bogart v. McClung, 11 Heisk. 113; Reed's Appeal (Pa.), 7 Atl. Rep. 174; Carter v. Carter, 82 Va. 624; Johnson v. Crippen,

62 Miss. 597; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112; Central R. Co. v. Hetfield, 18 N. Y. 323; Rider v. Rieley, 22 Md. 540; Glenn v. Grover, 3 Md. 227; or by corroborating circumstances *equivalent in weight to another witness*. Vigel v. Hopp, 104 U. S. 441; Morrison v. Durr, 122 U. S. 518; Walcott v. Watson, 53 Fed. Rep. 429; Brooks v. Silver, 5 Del. Ch. 7; Frink v. Adams, 36 N. J. Eq. 485, 488. “Or a preponderance of proof in favor of the complainant.” Bent v. Smith, 22 N. J. Eq. 560, 566. Very strong proof is required to overcome an answer and thereby impeach the verity of a sealed instrument. Major v. Ficklin, 85 Va. 782; s. c., 8 S. E. Rep. 715; Stiles v. Willis, 66 Md. 552; Beaumont v. Bramley, 1 Turn. & Rus. 41. The rule applies although the equity of the complainant's bill is the allegation of fraud. Southern Development Co. v. Silva, 125 U. S. 247; Morris & Co. R. Co. v. Blair, 9 N. J. Eq. 635. Where a statute requires the defendant in certain cases to answer under oath though the discovery would tend to convict him of a criminal charge, and the complainant is by the statute permitted to waive such an answer but neglects to do so, the answer is evidence for the defendant. Patterson v. Scott (Ill.), 31 N. E. Rep. 483.

of avoidance will not be considered unless established by proof.<sup>1</sup>

§ 368. **Hearing on bill and answer.**—If no replication is filed by a plaintiff but the case is set down for a hearing on the bill and answer, all the facts stated in the answer are to be taken as true, whether responsive to the averments of the bill or not.<sup>2</sup>

<sup>1</sup> *Wilkinson v. Bauerle*, 41 N. J. Eq. 686; *s. c.*, 7 Atl. Rep. 514; *Wells v. Houston*, 87 Vt. 245; *Mott v. Harrington*, 12 Vt. 199; *Cannon v. Norton*, 14 Vt. 178; *Lane v. Marshall*, 15 Vt. 85; *Pierson v. Clayes*, 15 Vt. 98; *McDonald v. McDonald*, 16 Vt. 620; *Allen v. Mower*, 17 Vt. 61; *Sanborn v. Kittredge*, 20 Vt. 632; *Grafton Bank v. Doe*, 19 Vt. 463; *Blaisdell v. Bowers*, 40 Vt. 126; *Rich v. Austin*, 40 Vt. 416; *Clarke v. White*, 12 Pet. 178; *McCoy v. Rhodes*, 11 How. 181; *Allen v. O'Donald*, 28 Fed. Rep. 17; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Miller v. Wack*, 1 N. J. Eq. 205; *Hoff v. Burd*, 17 N. J. Eq. 201; *Van Dyke v. Van Dyke*, 26 N. J. Eq. 180; *Fisler v. Porch*, 10 N. J. Eq. 243; *Hutchinson v. Tindall*, 8 N. J. Eq. 857; *Vanderhoof v. Clayton*, 6 N. J. Eq. 192; *Neville v. Demeritt*, 2 N. J. Eq. 821; *Dickey v. Allen*, 2 N. J. Eq. 40; *Dickerson v. Wenman*, 85 N. J. Eq. 368, 369; *Brown v. Kahnweiler*, 28 N. J. Eq. 811; *Voorhees v. Voorhees*, 18 N. J. Eq. 223; *Cecil v. Cecil*, 19 Md. 73; *Salmon v. Clagett*, 8 Bland, 125; *Gibson v. McCormick*, 10 Gill & J. 65; *Barton v. Barton*, 75 Ala. 400; *Pembert v. Brown*, 17 Ala. 667; *Wynn v. Rosette*, 66 Ala. 587; *Peaks v. Mc-Avey (Me.)*, 7 Atl. Rep. 270; *Bradley v. Webb*, 58 Me. 462; *Leach v. Fobes*, 11 Gray, 506; *Wakeman v. Grover*, 4 Paige, 23; *Gordon v. Bell*, 50 Ala. 213; *O'Brien v. Fry*, 82 Ill. 274; *Hart v. Carpenter*, 86 Mich. 402; *Ives v.*

*Hazard*, 4 R. L. 14; *Rogers v. Mitchell*, 41 N. H. 157; *Lampton v. Lampton*, 6 Monr. 620; *Carter v. Sleeper*, 5 Dana, 268; *Price v. Gates*, 7 Blackf. 163; *Purcell v. Purcell*, 4 Hen. & M. 511; *Gordon v. Sims*, 2 M'Cord Ch. 156; *Miles v. Miles*, 82 N. H. 147. Where a case is reserved for the full court upon the bill, answer and replication, and agreed statement of facts, the allegations in the answer are to be taken as true only so far as they are supported by the facts agreed. *Taunton v. Taylor*, 116 Mass. 255.

<sup>2</sup> *Perkins v. Nichols*, 11 Allen, 542; *Bierne v. Ray (West Va.)*, 16 S. E. Rep. 804; *Banks v. Manchester*, 128 U. S. 244; *Walton v. Cody*, 1 Wis. 420; *Tainter v. Clark*, 5 Allen, 66; *Funday v. Smith*, 6 Munf. 142; *Snyder v. Martin*, 17 West Va. 276; *Barton's Chancery Practice*, 398; *Estep v. Watkins*, 1 Bland, 486, 488; *Salmon v. Clagett*, 8 Bland, 125, 141; *Copeland v. Crane*, 9 Pick. 78; *Russell v. Moffit*, 6 Howard (Miss.), 303; *Slason v. Wright*, 14 Vt. 208; *Lowry v. Armstrong*, 2 Stew. & P. 297; *Kitchell v. Burgwin*, 21 Ill. 40; *Paine v. Frazier*, 4 Scam. (Ill.) 55; *Mason v. McGirr*, 28 Ill. 322; *Buntain v. Wood*, 29 Ill. 504; *Cassell v. Ross*, 33 Ill. 244; *Knapp v. Gass*, 68 Ill. 492; *Fordyce v. Shriver*, 115 Ill. 530; *Cook County v. Great Western R. Co.*, 119 Ill. 218. See, however, *Buchanan v. Buchanan*, 72 Ala. 55; *Bunker v. Anderson*, 82 N. J. Eq. 35; *Gunnell v. Bird*, 10

§ 369. What constitutes a responsive answer.— The question as to what constitutes a responsive answer is often very nicely balanced, and the decisions on the subject are numerous and not entirely harmonious. But there are some principles and rules to be deduced from them sufficient to decide satisfactorily almost every case that will arise. When the plaintiff calls upon the defendant to answer the allegations contained in the bill he makes him his witness for that purpose only but for no other. Whatever constitutes in truth a part of the facts stated in the bill the defendant has a right, indeed is bound, to set out. But he cannot make himself a witness for himself generally and introduce other facts either in avoidance or defense. It is deemed to be a test whether as a witness on examination on a trial at law he could be cross-examined as to the matter which he states in anticipation of his defense.<sup>1</sup>

Wall. 804; *Roach v. Summers*, 20 Wall. 165. The thirty-eighth section of the New Jersey chancery act (Nix Dig. 100) provides that when a case is brought to hearing on bill and answer only, the answer shall be taken as true in all points. This applies as well to such parts as are not responsive to the bill as to those that are; any new matter set up as a defense must be taken as true. The words of the statute are clear, and include the case of a co-defendant. See *Vanderveer v. Holcomb*, 17 N. J. Eq. 553; *Doremus v. Cameron*, 49 N. J. Eq. 1; *Reed v. Reed*, 16 N. J. Eq. 248; *Gas-kill v. Sine*, 18 N. J. Eq. 130; *Hoff v. Burd*, 17 N. J. Eq. 201; *Booraem v. Wells*, 19 N. J. Eq. 87. A statute which provides that the defendant's answer shall be taken as true on the hearing upon bill and answer without replication applies only to cases where the hearing is formally set or ordered on bill and answer and not to a hearing upon bill, answer and proofs without any formal order for the same. *Corbus v. Teed*, 69 Ill. 206. United States Equity Rule 41 pro-

vides that "if the complainant in his bill shall waive an answer under oath or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor unless the cause be set down for hearing on bill and answer only. . . ." See *Banks v. Machester*, 128 U. S. 244; *Gettings v. Burch*, 9 Cranch, 372; *Cavender v. Cavender*, 114 U. S. 464; *Roach v. Summers*, 20 Wall. 165; *Gunnell v. Bird*, 10 Wall. 804; *Conley v. Nailor*, 118 U. S. 127; *Leeds v. Marine Ins. Co.*, 2 Wheat. 380. The answer of the defendant to a bill in chancery, not found to be true by the committee or the court, is no evidence in the court above of the facts stated in such answer. *Callender v. Colegrove*, 17 Conn. 2.

<sup>1</sup> *Dunham v. Gates*, 1 Hoff. Ch. 185. One of the most instructive cases on this point is *Eaton's Appeal*, 66 Pa. St. 483. There a bill for an account between partners averred that



§ 370. The same subject continued.—“ Thus, if a plaintiff state an act, transaction or contract as the foundation of his equity, the defendant has a right to state the whole of such act, transaction or contract as in truth it was. Otherwise a plaintiff by giving only part of a contract, if the defendant must admit that part and cannot go on to describe truly all

the plaintiff and two defendants had equal interests. One defendant answered that he had four-ninths, the plaintiff two-ninths, and the other partner three-ninths. The answer was held to be responsive. Justice Sharswood said:—“ A few of the many decisions may be referred to in support of these views. One of the earliest is *Kirkpatrick v. Love*, Ambler, 589. There was a decree for a general account, both sides to be examined upon interrogatories. Plaintiff admitted the receipt of a parcel of satins, and in the same sentence swore that he had paid for them; in other words, that it was a cash transaction. It was held that the master was right in refusing to charge the plaintiff with the satins. The court put it upon the ground that the charge and discharge was in the same sentence; otherwise it had been if the charge and discharge or avoidance had been in a distinct sentence. In *Blount v. Burrow*, 4 Bro. C. C. 75, Lord Hardwicke said:—‘ If a man admits by his answer that he received several sums at particular times, and in the same answer swears he paid away those sums at other times in discharge, he must prove his discharge, otherwise it would be to allow a man to swear for himself and to be his own witness.’ Lord Chancellor Eldon in *Ridgeway v. Darwin*, 7 Ves. 404, said that ‘ if a man admitted he had received certain sums, which sums he had paid, the discharge following in the same sentence, that would do.’

And afterwards more distinctly in *Thompson v. Lamb*, 7 Ves. 588, ‘ a person charged by his answer cannot by his answer discharge himself, nor even by his examination, unless it is in this way: if the answer or examination states that upon a particular day he received a sum of money and paid it over, that may discharge him; but if he says that upon a particular day he received a sum of money and upon a subsequent day he paid it over, that cannot be used in his discharge, for it is a different transaction.’ These cases certainly cannot mean that if the defendant includes the fact of payment in the same sentence with the admission of the receipt, that alone will avail, unless from the inference to be made—that they were both parts of one and the same transaction. Sir William Grant so states it in *Robinson v. Scotney*, 19 Ves. 582: ‘ The instance usually put is that he received a sum of money and immediately handed it over.’ In *Bellows v. Stone*, 48 N. H. 485, there is an able and exhaustive opinion by Chief Justice Parker. He declares the true distinction to be between allegations upon those subjects upon which the bill requires an answer and allegations of new matter not stated or inquired of in the bill but introduced by the defendant in his defense. Whether the plaintiff calls upon the defendant to make an answer which must directly deny or affirm some statement, or whether he requires him to make a statement



the parts of it, the grossest injustice might be done. The defendant must answer every material allegation in the bill, whether specially interrogated thereto or not, and unless he states the act or contract fully as it truly was, how can he conscientiously swear that the facts in his answer are true? Half a fact or half a contract is not the truth. Neither is it

of the facts upon the particular subject-matter, the principle is the same. If the answer which is required involve some statement favorable to the defendant other than matter merely in denial of the plaintiff's allegation, the defendant being required to furnish that matter is entitled to the benefit of it. An answer does not set up a fact 'by way of avoidance merely' when it is only a response which the defendant is obliged to make to the bill of the plaintiff. He [Parker, C. J.] proceeds to lay down this as a test of the responsiveness of an answer: 'If the whole subject-matter of the statement or allegation in the answer might have been left out, then the allegation in the answer upon that subject is in no way responsive to the bill — the bill requiring no statement upon that point. But if the omission of some statement upon that subject would furnish just ground of exception to the answer, then the statement to the extent to which it is required is but a response to the requisition of the plaintiff.' The same principles will be found further illustrated in *Schwartz v. Wendell*, Walk. Ch. 267, and *Cooper v. Tappan*, 9 Wis. 361. In *Ringgold v. Ringgold*, 1 Harris & Gill, 11, it is said that if the answer admit liability there can be no escape from it but by proof, but everything it says with regard to the creation of the liability must be taken together; and in *Allen v. Mower*, 17 Vt. 61: — 'It is readily perceived that everything in

the answer responsive to the bill as to the creation of the original liability charged must be taken together as part and parcel of one entire transaction.' Accordingly in *Dunham v. Jackson*, 6 Wend. 22, where a bill was filed to redeem stock, and it alleged the stock to have been pledged for a certain sum, and the answer stated that it was pledged at the same time for an additional sum, the answer was held to be responsive. Mr. Justice Marcy said: — 'Whether he has gone beyond what he was required to do may be tested, I think, by supposing an interrogatory inserted in the bill pointing to the very matter which he has answered and he had refused to answer. Interrogatories are not a necessary part of the bill, nor are they to be answered unless they are such as are warranted by the premises and allegations of the bill. If the respondent had stopped after denying that the stock was pledged for the loan of \$500, and refused to answer an interrogatory as to the amount for which it was pledged, because such interrogatory was not warranted by the bill, there would have been, it seems to me, very little difficulty in showing the answer to be insufficient. The defendant is bound to admit or deny the facts stated in the bill with all their material circumstances without special interrogatories for that purpose.' Our own cases as far they have gone conform to these principles. In *Eberly v. Groff*, 8 Harris, 251, the bill charged that an

true if in truth the terms of the contract are different. But another subsequent, independent and distinct fact not stated in the bill is not responsive and therefore not within the rule."<sup>1</sup>

assignment was without consideration. The answer denied that it was without consideration, and proceeded to set forth what the consideration was, and it was held to be responsive. There was, indeed, an interrogatory asking for the consideration, but that, as we have seen, did not make it responsive if in point of fact it was not so. So in *Pusey v. Wright*, 7 Casey, 387, the present chief justice said:—"If a contract be set forth and the defendant be called on to answer it, a denial that it exists *modo et forma* would not be good according to chancery practice, for this is subject to the implication that it existed in some other form; to avoid this the defendant should state how it existed and wherein it had an existence." And, again, it is not doubted but that if a different contract had been set up by defendants, which was alleged to have superseded the one charged by the plaintiffs, they would have had the affirmative of the issue. The answer then would not have been responsive to the bill—it would have been by way of confession and avoidance, and have required proof. But the answer here admitted the contract and stated its terms, but denied the existence of the stipulations in it, alleged by the plaintiffs as the foundation of their claim for relief. This did not require the defendants to make proof if the plaintiffs did not. These principles and authorities amply sustain the conclusion of the master in stating the terms of the contract of partnership. The defendants were called on, not merely to

admit or deny it *modo et forma*, but to set out what were the terms agreed upon. They could have been asked especially upon an interrogatory based upon the statement of the bill to answer what the terms were, and this shows that the answer, though there was no interrogatory, was directly responsive."

<sup>1</sup> Sharswood, J., in *Eaton's Appeal*, 66 Pa. St. 488, 490. An answer, in stating the particulars of a transaction charged and inquired into by the bill, is responsive. *Merritt v. Brown*, 19 N. J. Eq. 286. "Where a deed or instrument in writing is necessary to establish any right, and the bill requires evidence of such right, the answer unaccompanied by such deed or writing will be no evidence, although it should directly respond to the bill, because the answer is only in the nature of parol evidence, and in such case evidence of a higher grade is required." *Neale v. Hagthorp*, 8 Bland, 551, 567, citing *Brown v. Selwin*, Cas. Temp. Talbot, 242; *Hayward v. Carroll*, 4 H. & J. 521; *Jones v. Slubey*, 5 H. & J. 381. A bill to reform the certificate of a married woman's acknowledgment to a deed executed by her and her husband alleged that she was examined by the officer separate and apart from her husband, and that by mistake the fact was not stated in the certificate. It was held that an allegation in the answer, "We deny the statements set forth in . . . said bill," was responsive, and cast on plaintiffs the burden of proving their allegations. *Hand v. Weidner* (Pa.), 25 Atl. Rep. 38, distinguishing

§ 371. Responsive answers illustrated.— The plaintiff in his bill against a corporation and its stockholders denying his right alleged that he was an original subscriber for stock, that he tendered the company the amount due on his stock, which was refused and his right as a stockholder denied. The answer admitted his subscription, but alleged that it was accompanied by an agreement that it was wholly for the use of the defendant stockholders. It was held that the allegation in the answer was not subsequent matter in avoidance, but a material portion of the facts in the case, and responsive to the bill.<sup>1</sup> To a bill by a wife against her husband to recover a sum of money alleged to have been paid by her in building and furnishing their house, and for which the defendant had given her no security, an answer that the money had been given him by the complainant, and that there was no agreement, contract or understanding that he was to repay or in any way secure the money, is responsive.<sup>2</sup> Where a bill to set aside a decree and recover property alleges that the decree was obtained by fraud and collusion, and the pleas and answers under oath deny the fraud and collusion charged and aver a purchase of the property in good faith for valuable consideration, etc., these averments are responsive to the allegations of the bill.<sup>3</sup> To a bill to subject stocks of an estate to the payment of a debt for which they were held as collateral security, the answer by one of the executors admitted that the money was borrowed from the plaintiff and the security given as alleged in the bill, but averred that the loan was made to the business firm of which the executor was a member, and that the stock pledged by the executor as security then belonged to the estate, and that these facts were known to the plaintiff. It was held that the answer set up no new contract, but was responsive to the bill.<sup>4</sup>

*Association v. Sowers*, 184 Pa. St. 854; s. c., 19 Atl. Rep. 686.

plaintiff equal to the testimony of another witness.

<sup>1</sup> *Appeal of Rowley*, 115 Pa. St. 150, holding, also, that the statement, acknowledgment and affidavit upon which the governor directed the charter to issue, together with the charter itself, was testimony corroborative of the testimony of the

<sup>2</sup> *Gleghorne v. Gleghorne*, 118 Pa. St. 383; s. c., 11 Atl. Rep. 797.

<sup>3</sup> *Beals v. Illinois &c. R. Co.*, 138 U. S. 290.

<sup>4</sup> *Bell v. Farmers' Deposit Nat. Bank*, 181 Pa. St. 318; s. c., 25 W. N. C. 166; 18 Atl. Rep. 1079.

**§ 372. The same subject continued.**— In a suit to enforce the lien of a mortgage against a husband and wife, the wife answered, admitting that she signed the instrument, but only upon the false and fraudulent misrepresentations of the complainant's agent, who obtained her signature and acknowledgment, and that she was ignorant, and unable to read. A general replication was filed, and the cause was heard on the pleadings alone. The court held that the allegations of fraud were not new matter in avoidance, but were responsive to the bill, and were sufficient to prove that the wife did not execute the mortgage.<sup>1</sup>

**§ 373. Answers not responsive illustrated.**— Upon a bill between partners for an account of the partnership transactions, an allegation of the answer that a third party is a joint partner with the complainant and defendant, and therefore a necessary party to the suit, is not responsive, and cannot be assumed to be true, at the hearing upon exceptions to the answer.<sup>2</sup> Usury set up in an answer to a bill for foreclosure, the case being heard on bill, answer and replication, must be proved.<sup>3</sup> In a sworn answer to a bill to restrain the collection

<sup>1</sup> Reid v. McCallister, 49 Fed. Rep. 16. The court said: — "Matter in avoidance is something subsequent to and distinct from or *dehors* the fact admitted; but if the admission and avoidance constitute one single fact or transaction the answer is evidence of both. Hart v. Ten Eyck, 2 Johns. 88 and note. The plea of *non est factum* denies the execution of the deed by the defendant, puts the fact of execution in issue, and under it you may prove, because comprehended in it, that the defendant was imposed upon and put her name to the paper under an erroneous impression as to its character or contents. Van Valkenburg v. Ronk, 12 Johns. 328. And so here the answer is competent, and until contradicted sufficient evidence that the defendant put her name to this instrument under an entirely erroneous impres-

sion of its contents, which impression was designedly produced by the false representations of the plaintiff." Where a bill by judgment creditors to set aside a sale under execution, on the ground of fraud in the judgment, calls for an answer under oath, and the answer is made accordingly, denying each and all of the allegations of fraud, it is responsive to the bill. Morrison v. Durr, 122 U.S. 518; s. c., 7 S. Ct. Rep. 1215. Where counsel wish particular parts of the answer pointed out as responsive to the bill, they should call the attention of the court thereto, and ask it especially to call the jury's attention to them. Adkins v. Hutchings, 79 Ga. 260; s. c., 4 S. E. Rep. 837; Webb v. Robinson, 14 Ga. 216.

<sup>2</sup> Brewer v. Norcross, 17 N. J. Eq. 219.

<sup>3</sup> Roberts v. Birge, 20 N. J. Eq.

of a judgment on the ground that it was recovered on a prior judgment, which was recovered on a note which the judgment creditor held as collateral security, and that the debt for which the note was collateral had been paid, an allegation denying defendant's knowledge of any defense to the note is not responsive to the bill.<sup>1</sup> In a suit by a creditor for an account of a deceased husband's estate, and for payment of plaintiff's debt, the wife, who was also administratrix, answered that a certain bond executed by her father to the husband had, in pursuance to an agreement at the time of its execution, been assigned to her by a post-nuptial settlement as her sole and separate estate. It was held that these allegations were in no way responsive to any allegation in the bill.<sup>2</sup> Where the defendant in a bill to foreclose a mortgage answers, under oath, admitting the execution of the mortgage, but alleging that it was given in lieu of another mortgage that the complainant agreed to cancel and return to the defendant, which he failed to do, and praying that he may be compelled to so cancel and return it before the relief sought is granted, the alleged agreement is new matter and not responsive to the bill.<sup>3</sup>

**§ 374. Answer refuting itself — Contradiction of deeds.**— The rule which makes responsive answers evidence for defendants *ex necessitate* applies only to fair answers, not to those which upon their face are incredible.<sup>4</sup> And an answer may contain within itself such circumstances as will alone suffice to deprive it of all efficacy.<sup>5</sup> Thus where an answer denies a fact charged in the bill, but proceeds to give a circumstantial account of the transaction inconsistent with the truth of the

189. See, also, *Bray v. Hartough*, 4 N. J. Eq. 46.

<sup>1</sup> *Harding v. Hawkins* (Ill.), 81 N. E. Rep. 807.

<sup>2</sup> *Lewis v. Mason*, 84 Va. 731; s. c., 10 S. E. Rep. 529. Facts set up in explanation or justification of a misrepresentation admitted to be untrue must be proved by the defendant. *Winans v. Winans*, 19 N. J. Eq. 220.

<sup>3</sup> *Ingersoll v. Stiger* (N. J.), 19 Atl. Rep. 842. Where the bill alleges that defendant violated the terms of a

written agreement, defendant's answer that she had the right so to do by virtue of a contemporaneous parol agreement is not responsive, and the burden of proving the parol agreement is on her. *Appeal of Kenney* (Pa.), 12 Atl. Rep. 589.

<sup>4</sup> *Stevens v. Post*, 12 N. J. Eq. 408.

<sup>5</sup> *Commercial Bank v. Reckless*, 5 N. J. Eq. 650; *Brown v. Bulkley*, 14 N. J. Eq. 294; *Dunham v. Gates*, 1 Hoff. Ch. 185; *Morris v. White*, 36 N. J. Eq. 329.

denial, a single witness without corroborating circumstances is sufficient to prove the fact charged.<sup>1</sup> And the answer of a mortgagor to a bill of foreclosure denying the delivery of the mortgage is not, in itself, sufficient to overcome the presumption of delivery arising from the possession of the mortgage by the mortgagee duly executed, acknowledged and recorded.<sup>2</sup> The allegations of an answer that the recitals contained in a deed are fraudulent and false, unsupported by evidence of fraud or mistake, are altogether inadequate to overcome the express language of the deed.<sup>3</sup>

§ 375. Answer overcome by circumstances alone.—Evidence sufficient to outweigh a sworn answer may consist of circumstances alone.<sup>4</sup> A co-defendant in a creditors' bill, who was charged with being indebted to the principal defendant for goods sold, answered under oath that the goods had been paid for by offsetting against them a debt due from the principal defendant. When examined as a witness he testified evasively, and when questioned as to details said that he could not remember, and must refer to his books. It was admitted that the books had been falsified in order to cheat a third person. Defendant's book-keeper testified that the entries in regard to the transaction in question had been changed. The evidence was held sufficient to impeach the sworn answer.<sup>5</sup>

<sup>1</sup> *Barrague v. Siter*, 9 Ark. 545.

<sup>2</sup> *Commercial Bank v. Reckless*, 5 N. J. Eq. 650; *Long v. Kinkel*, 36 N. J. Eq. 359.

<sup>3</sup> *Forrest v. Frazier*, 2 Md. Ch. 147.

<sup>4</sup> *Bowden v. Johnson*, 107 U. S. 251, where the omission of the defendant to testify was taken notice of as a very unfavorable circumstance. *Union Bank v. Geary*, 5 Peters, 99, 111. But in Maryland "pregnant circumstances" alone have been expressly ruled to be insufficient. *Roberts v. Salisbury*, 8 Gill & J. 425, 433; *Glenn v. Grover*, 8 Md. 212, 229; *Ing v. Brown*, 8 Md. Ch. 521, 524. "Where the defendant does not rely on his answer alone,

but offers himself as a witness, the rule that one witness is not sufficient to overcome a responsive answer to a material fact under oath is hardly applicable. An answer may carry its refutation within itself. *Brown v. Bulkley*, 14 N. J. Eq. 294; *Dunham v. Gates*, 1 Hoff. Ch. 185. And the defendant may refute himself by his own evidence. There may also be evidence arising from circumstances stronger than the testimony of any single witness. *Clark v. Van Riemsdyk*, 9 Cranch, 153." *Morris v. White*, 36 N. J. Eq. 324, 329.

<sup>5</sup> *Deimel v. Brown* (Ill.), 27 N. E. Rep. 44. "The cases to which the rule [requiring two witnesses or their



§ 376. Answer alleging facts upon hearsay.— The answer of a defendant formally denying that which he is not alleged to know, and which from his situation he could not know with any certainty, is not so conclusive as to require more than one witness on the part of the complainant to establish what is thus denied.<sup>1</sup> Thus when an executor or administrator, answering in his representative character, alleges facts of which

equivalent] was intended to apply must be those in which the facts denied depended on oral only and circumstantial evidence; not where they were conclusively proved by the production of the written contract; nor are the exceptions to the rule confined to cases where the contract denied has been formally signed and executed by the parties. As, for example, suppose a verbal contract were made to which no witness could testify and which never had been reduced to writing and executed as the agreement of the contracting parties, and the complainant charging and seeking the performance of such contract were to exhibit with his bill twenty letters written by the defendant to third persons stating the contract in every particular; all of which letters were admitted to be genuine by the answer, which, however, denied the contract. Could it be contended that such letters would be less satisfactory than the proof of twenty witnesses who may have heard the defendant on one occasion only state or admit the same facts that were contained in the letters? . . . The absurdity of applying this chancery rule to such a case is too clear to be countenanced for a moment." *Jones v. Belt*, 2 Gill (Md.), 106, 122. See, also, *Trump v. Baltzell*, 3 Md. 295, 308; *Brown v. Brown*, 10 Yerger (Tenn.), 84.

<sup>1</sup> *Garrow v. Carpenter*, 5 Porter (Ala.), 359; *Combs v. Boswell*, 2 Dana,

474; *Lawrence v. Lawrence*, 4 Bibb, 885; *Watson v. Palmer*, 5 Ark. 501, 506; *Loomis v. Fay*, 24 Vt. 240; *Lawrence v. Lawrence*, 21 N. J. Eq. 817; *Clark v. Van Riemsdyk*, 9 Cranch, 158; *Bell v. Romaine*, 80 N. J. Eq. 24, 27; *Boyd v. Reed*, 6 Heisk. 631. Where a defendant, who has sworn to his answer, states either in the answer or under oath in another suit that he has no personal knowledge as to the matters set up in the answer, such answer is not evidence in his favor. *Deimel v. Brown* (Ill.), 27 N. E. Rep. 44. "While the defendant's answer which is required to be sworn to is made evidence in the cause by the complainant, it is only entitled to weight when it is entitled to belief; and if he chooses to swear to that which the court sees he cannot or which he admits he does not know, he is entitled to no more credit and is subject to the same censure and condemnation as any other reckless witness who the court sees is trying to impose upon it his belief when he should only speak of his knowledge. The court is not a mere machine to weigh everything that is offered without examining its value, any more when the defendant's oath is put into the scale than when examining the testimony of any other witness." *Fryrear v. Lawrence*, 5 Gilm. (Ill.) 325, quoted and approved in *Deimel v. Brown* (Ill.), 27 N. E. Rep. 45.



he can have no personal knowledge, the answer is not accorded the weight which is due to that of a party speaking of facts which may be within his own knowledge.<sup>1</sup>

**§ 377. Answer on information and belief.**—Where a defendant in his answer only denies a fact charged in the bill according to the best of his knowledge and belief, a single witness on the part of the complainant is sufficient to establish the fact.<sup>2</sup> Thus a denial of knowledge, information or belief concerning the matter of an allegation in the bill, “wherefore he denies the same,” is not evidence for the defendant that requires to be overcome.<sup>3</sup>

**§ 378. Answers not direct and positive.**—Where the answer contains no positive denial of the material fact distinctly alleged and charged in the bill, the complainant is not required to increase the weight of his evidence to overcome the answer.<sup>4</sup>

<sup>1</sup> *Pennington v. Gittings*, 2 Gill & J. 208, 216, holding, however, and of course, that such an answer requires the complainant to prove his case.

<sup>2</sup> *Knickerbacker v. Harris*, 1 Paige, 210; *Town v. Needham*, 8 Paige, 546; *Allen v. O'Donald*, 28 Fed. Rep. 17; *Watson v. Palmer*, 5 Ark. 501; *McKissick v. Martin*, 12 Heisk. 313; *Wilkes v. May*, 8 Head, 175; *Atlantic F. & M. Ins. Co. v. Wilson*, 5 R. L. 479; *Fryrear v. Lawrence*, 5 Gilm. (Ill.), 325; *McGuffie v. Planters' Bank*, Freem. (Miss.) 383; *Toulme v. Clark*, 64 Miss. 471; *Loomis v. Fay*, 24 Vt. 240. *Cf. Carrick v. Prater*, 10 Humph. (Tenn.) 270. A denial, on information and belief, of notice to another, is not sufficient of itself to dissolve an injunction. *Pierson v. Ryerson*, 5 N. J. Eq. 196.

<sup>3</sup> *The Halladay Case*, 27 Fed. Rep. 830. But an answer founded upon mere hearsay is sufficient to put the complainant upon proof of the averments in the bill. *Doub v. Barnes*, 1 Md. Ch. 127, 132. And if no evidence is produced, the answer must pre-

vail. *Carpenter v. Edwards*, 64 Miss. 595; *Robinson v. Mandell*, 3 Cliff. 169.

<sup>4</sup> *Benson v. Woolverton*, 15 N. J. Eq. 158; *Rhea v. Allison*, 3 Head, 179; *Farnam v. Brooks*, 9 Pick. 212; *Le Neve v. Le Neve*, 1 Ves. 66; *Barague v. Siter*, 9 Ark. 545. “Answers in equity may be sufficient as pleadings, if no exception to them is taken, and yet not be sufficiently full, explicit and unequivocal to be used as evidence.” *Morse v. Hill*, 136 Mass. 60, 69. On a hearing on bill and answer and depositions, a mere averment in the answer that the defendants “claim and charge” that the rents, issues and profits received by the complainant as mortgagee in possession were more than sufficient to satisfy the mortgage in suit is not conclusive on the complainant as a statement of fact. *Denman v. Nelson*, 31 N. J. Eq. 452. The answer of a defendant that he has seen the answer of another defendant in the cause and that the same is true cannot avail to make such answer evi-

Thus "the opinion of a defendant, generally expressed, that a matter was transacted pursuant to law, cannot outweigh the positive declaration of a witness who states the facts which show that the law was disregarded."<sup>1</sup> So the testimony of a witness who swears positively that he paid the defendant a certain sum of money will prevail over an answer which avers that if the defendant received the money he does not recollect the fact.<sup>2</sup>

**§ 379. Answer alleging ignorance of the facts.**—Where an answer in the body of it purports to be an answer to the whole bill, but the defendant declares that he is entirely ignorant of the matters contained in the bill and leaves the complainant to make out the best case he can, or in language to that effect, and the plaintiff files a general replication, all the allegations of the bill are thus denied and put in issue, and consequently all of them must be proved at the hearing.<sup>3</sup> But such an answer has no weight as evidence and simply requires the complainant to prove his case.<sup>4</sup>

**§ 380. Answer denying legal conclusions.**—A denial in an answer can avail nothing when the affirmative is conclusively presumed by a rule of law.<sup>5</sup> "Intentions and motives are not facts touching which the answer is conclusive."<sup>6</sup> Thus

dence for himself, when the answer referred to was not then filed, and there is nothing to identify it with the answer afterwards filed by such co-defendant. *Carr v. Weld*, 19 N. J. Eq. 319.

<sup>1</sup> *Lyon v. Hunt*, 11 Ala. 295, 317.

<sup>2</sup> *Phillips v. Richardson*, 4 J. J. Marsh. 212.

<sup>3</sup> *Neale v. Hagthorp*, 3 Bland, 551, 579; *Potter v. Potter*, 1 Ves. 274; *Amhurst v. King*, 1 Cond. Ch. Rep. 407.

<sup>4</sup> *Young v. Hopkins*, 6 T. B. Mon. (Ky.) 18; *Harlan v. Wingate*, 2 J. J. Marsh. 188; *Brown v. Pierce*, 7 Wall. 205, 211, 212; *Drury v. Conner*, 6 Har. & J. 288; *Paulding v. Watson*,

21 Ala. 279; *Williamson v. McConnell*, 4 Dana, 454.

<sup>5</sup> *Smallwood v. Lewin*, 15 N. J. Eq. 60; *Adams v. Adams*, 21 Wall. 185; *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 319. Inferences of law or fact drawn by a defendant from his own averments are solely for the court. *Mazet v. Pittsburgh*, 137 Pa. St. 548. See, also, *Copeland v. Crane*, 9 Pick. 78.

<sup>6</sup> *Belford v. Crane*, 16 N. J. Eq. 265. But in *Beatty v. Davis*, 9 Gill, 218 (see, also, *Glenn v. Grover*, 8 Md. 212, 229), it was said that "an answer responsive to the bill, emanating from a party made a witness by the act of the complainant, speaking in refer-

a denial by the answer of the existence of fraud will not avail to disprove it where the answer admits facts from which fraud follows as a natural and legal, if not a necessary and unavoidable, conclusion.<sup>1</sup>

§ 381. *Falsus in uno, falsus in omnibus.*—It has been said that “where the answer is contradicted in any one or more important particulars by sufficient evidence, that is, by two witnesses or one witness with corroborating circumstances, it is deprived in all other respects of that weight which is allowed to answers by the rules of a court of equity; for being falsified in one thing, no confidence can be placed in it as to the others according to the maxim *falsus in uno, falsus in omnibus.*”<sup>2</sup>

§ 382. Answer of one defendant against a co-defendant.—It is a general and strict<sup>3</sup> rule that the answer of one de-

ence to the motives and views under the influence of which the transaction in dispute was made, a matter lying necessarily within his own bosom, must be held as conclusive upon the question of intention unless it is overcome by the testimony of two witnesses,” etc.

<sup>1</sup> Sayre v. Fredericks, 16 N. J. Eq. 205; Cook v. Johnson, 12 N. J. Eq. 51; Hoboken Bank v. Beckman, 38 N. J. Eq. 53; Gaines v. Russ, 20 Fla. 157.

<sup>2</sup> Roundtree v. Gordon, 8 Mo. 19, 25. And in Young v. Hopkins, 6 T. B. Mon. 18, it was said that where the answer is discredited on other points, one witness will prevail against it. See, also, Forsyth v. Clark, 8 Wend. 687, and cf. Fant v. Miller, 17 Gratt. 187. “When a witness is examined deliberately and in private upon interrogatories prepared, and has the opportunity of weighing his answers before he finally signs them, they being read over to him, it must, at least, be admitted that, whatever other disadvantages such a mode of

judicial inquiry may be exposed to, it can never be seriously urged that a witness has been entrapped by surprise and through inadvertence, and that he has been made to say in hurry and confusion, and from mere weakness of nerves and apprehension, that which, on reflection and deliberation and the free use of his understanding, he has a right to unsay. Therefore, in courts proceeding in this course of examination, the rule *falsus in uno, falsus in omnibus* is one of unquestionable justice.” Roundtree v. Gordon (*supra*), 8 Mo. 19, 25. The complainant cannot assail the character of the defendant in order to weaken the effect of his answer. Gibson's Suits in Chancery, § 460; Murray v. Johnson, 1 Head, 354; Butler v. Catling, 1 Root (Conn.), 810; Salmon v. Clagett, 8 Bland, 125; Brown v. Bulkley, 14 N. J. Eq. 294. Cf. Miller v. Tolleson, Harper's Eq. 145; Gillett v. Robbins, 12 Wis. 319; Petty v. Taylor, 5 Dana, 598.

<sup>3</sup> Bevans v. Sullivan, 4 Gill, 388, 391.

defendant is not evidence against another defendant,<sup>1</sup> especially where the defendant whose answer it is sought to use against a co-defendant is substantially a plaintiff.<sup>2</sup> Nor does it make any difference that one defendant is the agent of the other.<sup>3</sup> But a decree will not be reversed for error in refusing to exclude an answer as evidence against a co-defendant when the other testimony in the cause is sufficient to sustain it.<sup>4</sup>

**§ 383. The same subject continued.**— But the answer of one defendant is evidence against other defendants claiming through him,<sup>5</sup> or where the defendants are either legally or fraudulently combined so as to create a unity of interest between them.<sup>6</sup> So where one partner, in a joint and several answer put in by both, makes admissions as to his own acts relative to the business of the firm, and the other defendant states his belief that what is thus admitted by his copartner is true, a decree may be made against both on such admissions.<sup>7</sup> And in an interpleader suit where it appears by the answer of each defendant that he claimed the fund in dispute from the complainant, no other evidence of that fact need be produced to entitle the complainant to a decree.<sup>8</sup>

<sup>1</sup> *Glenn v. Grover*, 3 Md. 211, 229; *Hardesty v. Jones*, 10 Gill & J. 404; *Blakeney v. Ferguson*, 14 Ark. 640; *Christie v. Bishop*, 1 Barb. Ch. 105; *Salmon v. Smith*, 58 Miss. 399; *Hanover Nat. Bank v. Klein*, 64 Miss. 141; *Webb v. Pell*, 3 Paige, 368; *Clark v. Van Riemsdyk*, 9 Cranch, 153; *McKim v. Thompson*, 1 Bland, 160; *Savage v. Carroll*, 1 Ball & Beatty, 548, 553; *Reese v. Reese*, 41 Md. 554; *Stewart v. Stone*, 3 Gill & J. 514; *Hayward v. Carroll*, 4 H. & J. 520; *Calwell v. Boyer*, 8 Gill & J. 149; *Glenn v. Baker*, 1 Md. Ch. 78, 77; *Jones v. Hardesty*, 10 Gill & J. 464; *Wrottesley v. Bendish*, 3 P. Wms. 235; *Leigh v. Ward*, 2 Ventris, 72. The reason is that neither party should be charged by evidence without an opportunity to cross-examine the witness. *Powles v. Dilley*, 9 Gill (Md.), 223, 236.

<sup>2</sup> *Field v. Holland*, 6 Cranch, 8. One defendant may by admissions remove the bar of the statute of limitations against himself without affecting the others. *Fitzhugh v. McPherson*, 9 Gill & J. 51, 75.

<sup>3</sup> *Ladd v. Marine Ins. Co.*, 2 Wheat. 380.

<sup>4</sup> *Barrague v. Siter*, 9 Ark. 545.

<sup>5</sup> *Field v. Holland*, 8 Cranch, 8, disapproved in *Jones v. Hardesty*, 10 Gill & J. (Md.) 404, 415.

<sup>6</sup> *Christie v. Bishop*, 1 Barb. Ch. 105.

<sup>7</sup> *Judd v. Seaver*, 3 Paige, 548. See, also, *Dunham v. Gates*, 3 Barb. Ch. 196. But cf. *Bevans v. Sullivan*, 4 Gill, 383, 391.

<sup>8</sup> *Balchen v. Crawford*, 1 Sandf. Ch. 380. Admissions contained in the answer of one defendant will be received in evidence against a co-defendant, where the parties stand to each other in such relation that the

**§ 384. Answer of one defendant when available by a co-defendant.**—“Though it is laid down as a general rule that the answer of one defendant cannot be read by another defendant as evidence in his own favor, yet the universality of this rule has been controverted, and it has been held that where the answer in question is unfavorable to the plaintiff and is responsive to the bill by furnishing a disclosure of the facts required, it may be read as evidence in favor of a co-defendant, especially where the latter defends under the title of the former.”<sup>1</sup> There can be no judgment against defendants failing to answer where the principal matter of the bill put in issue by other defendants fails for want of proof;<sup>2</sup> but other matters not necessarily connected with the principal matter, alleged against one only of the defendants who did not appear in the action, will be taken as true and judgment rendered thereon against him.<sup>3</sup>

**§ 385. Corroborating evidence.**—“The circumstances to fortify a witness whose statement is contradicted by the answer must be clearly proved by indisputable evidence and not by the deposition of another witness relating different facts and contradicted in the same manner; for both depositions being annulled by the answer, neither can be resuscitated and brought to succor the other.”<sup>4</sup>

admissions of the one would be competent evidence against the other; but a co-defendant, having filed a separate answer, is entitled to every defense which his answer will allow to be made under it. *McElroy v. Ludlum*, 32 N. J. Eq. 828.

<sup>1</sup> 8 Greenleaf on Evidence, § 288, citing *Mills v. Gore*, 20 Pick. 28; *Miles v. Miles*, 32 N. H. 147; *Powles v. Dilley*, 9 Gill, 222. See, also, *Salmon v. Smith*, 58 Miss. 399; and cf. *Cannon v. Norton*, 14 Vt. 178. The case of *Field v. Holland*, 6 Cranch, 8, supports the view that the answer of one defendant is evidence against the plaintiff and inures to the benefit of co-defendants.

<sup>2</sup> *State v. Columbia*, 12 S. C. 370;

*Lingan v. Henderson*, 1 Bland, 261; *Clason v. Morris*, 10 Johns. 534. See, also, § 196, *supra*. “The settled doctrine of this court is that when one of several defendants makes default, followed by a *pro confesso*, and it appears from their defense that, on the whole case, the complainant is not entitled to succeed, he will not be allowed to do so even against him who made default.” *Salmon v. Smith*, 58 Miss. 399, 409, citing *Minor v. Stewart*, 2 How. 912; *Hargrove v. Martin*, 6 Smed. & M. 61.

<sup>3</sup> *State v. Columbia*, 12 S. C. 370.

<sup>4</sup> *Love v. Braxton*, 5 Call. 537, 544. “In applying the rule it is not necessary that the corroboration [of one witness] should be by additional ex-

§ 386. **Effect of failure to answer fully.**—Where a material and controlling fact which is clearly and fully averred in the bill is not denied or alluded to in the answer, some authorities hold that the fact must be taken as confessed,<sup>1</sup> especially if it be a fact which *prima facie* is within the knowledge, information or belief of the defendant.<sup>2</sup> Other authorities hold that while at law every fact alleged and not denied is taken as true, in chancery every allegation of fact not admitted and not denied must be proved, the failure to admit or deny being equivalent to a denial.<sup>3</sup> But in all cases a fact is not regarded

*press* proof on the particular fact in question. If that were required it would be equivalent to another witness. The preponderance may be effected by a contradiction of other material parts of the answer, or by any other evidence legally bearing on the subject-matter of the cause, tending to give probability to the statement of the one witness rather than to that of the defendant and thereby producing conviction of its truth." *Bent v. Smith*, 23 N. J. Eq. 560, 567. In *Norris v. Campbell*, 27 Md. 688, the testimony of the complainant and his son was held insufficient to outweigh the answer. See further, as to corroborating circumstances, *Thomason v. Smithson*, 7 Porter (Ala.), 144; *Brittin v. Crabtree*, 20 Ark. 30; *Only v. Walker*, 3 Atk. 407; *Robinson v. Hardin*, 26 Ga. 844; *Durham v. Taylor*, 29 Ga. 166; *Deimel v. Brown* (Ill.), 27 Atl. Rep. 44; *Preschbaker v. Feaman*, 32 Ill. 475; *Pickering v. Day*, 3 Houston, 474; *Gould v. Williamson*, 21 Me. 273; *Field v. Wilbur*, 49 Vt. 157; *American File Co. v. Garrett*, 110 U. S. 288; *Morrison v. Durr*, 122 U. S. 518; *Rowley's Appeal*, 115 Pa. St. 150.

<sup>1</sup> *Pinnell v. Boyd*, 88 N. J. Eq. 190; *Jones v. Knauss*, 81 N. J. Eq. 609; *Lee v. Stiger*, 80 N. J. Eq. 610; *Sanborn v. Adair*, 29 N. J. Eq. 388.

<sup>2</sup> *Grady v. Robinson*, 28 Ala. 289; *Smilie v. Siler*, 35 Ala. 88; *Clark v. Jones*, 41 Ala. 349; *McAllister v. Clopton*, 51 Miss. 257; *Mead v. Day*, 54 Miss. 58; *Neal v. Hagthorp*, 3 Bland (Md.), 551, 569, conceding that this rule stands in need of all the support it can derive from reason, authority and analogy.

<sup>3</sup> *Gibson's Suits in Chancery*, § 457; *Hill v. Walker*, 6 Cold. (Tenn.) 429; *Hardeman v. Burge*, 10 Yerg. 202; *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch. 602, an excellent case; *Glos v. Randolph*, 133 Ill. 197; *Brooks v. Byam*, 1 Story, 296, 302; *Meyers v. Busby*, 82 Fed. Rep. 670; *Webb v. Powers*, 2 W. & M. 497, 510; *Warner v. Dove*, 83 Md. 579, 584; *Eyler v. Crabbe*, 2 Md. 137, 154; *Warfield v. Gambrill*, 1 Gill & J. 503; *Pennington v. Gittings*, 2 Gill & J. 208, 216; *Joice v. Taylor*, 6 Gill & J. 54, 59; *Dilby v. Barnard*, 8 Gill & J. 170, 180; *Dugan v. Gittings*, 2 Gill & J. 215; *Briesch v. McCauley*, 7 Gill, 189, 196; *Young v. Grundy*, 6 Cranch, 51; *Agawam Co. v. Jordan*, 7 Wall. 583, 609; *Hopkins v. Stump*, 2 H. & J. (Md.) 301, 305; *Rider v. Rieley*, 22 Md. 540; *Brown v. Pierce*, 7 Wall. 211; *Hoyal v. Bryson*, 6 Heisk. (Tenn.) 142; *Cropper v. Burton*, 5 Leigh, 425; *Brockway v. Copp*, 3 Paige, 589; *Bagshaw v. Batson*, 1 Dick. 118; *Lunn v. Johnson*, 3 Ired.

as admitted by the failure of the defendant to answer it unless it can either be presumed or is alleged to be within the defendant's knowledge.<sup>1</sup> It is also settled that an evasive answer is not an admission.<sup>2</sup>

**§ 387. Admissions in an answer.**—On a hearing on bill, answer and replication, only those parts of the answer which are responsive to the bill can be evidence in favor of the defendants, but all its admissions can be used as evidence against them;<sup>3</sup> provided, however, that the admitted facts are put in issue by the bill.<sup>4</sup> The defendant also must abide by the case made in his answer, and cannot take advantage of another case made by the proofs,<sup>5</sup> especially where they are contradictory to an admission in his answer.<sup>6</sup>

**§ 388. Answers not under oath.**—Where an answer is not sworn to, an oath being waived, it is not evidence in favor of the defendant for any purpose; and a single undiscredited witness will be sufficient to prove the allegations in the bill which the answer denies.<sup>7</sup> But admissions in such an answer

Eq. 70. See, also, *Cowen v. Alsop*, 51 Miss. 158; *Hardwick v. Bassett*, 25 Mich. 149; *Yates v. Thompson*, 44 Ill. App. 145; *Dooley v. Stipp*, 21 Ill. 86; *Heacock v. Dureaux*, 42 Ill. 280; *Nelson v. Pinegar*, 80 Ill. 478; *De Wolf v. Long*, 2 Gilm. (Ill.) 679; *Wilson v. Kinney*, 14 Ill. 27; *Trenchard v. Warren*, 18 Ill. 142.

<sup>1</sup> *Clark v. Jones*, 41 Ala. 849, 851; *Thorington v. Carson*, 1 Porter (Ala.), 257; *Bank of Mobile v. P. & M. Bank & Co.*, 8 Ala. 772; *Cowan v. Price*, 1 Bibb, 178; *Moore v. Lockett*, 2 Bibb, 67; *Pearson v. Meaux*, 8 A. K. Marsh. 4; *Moscley v. Garrett*, 1 J. J. Marsh. 212; *Mitchell v. Maupin*, 8 Monr. 185; *Kennedy v. Meredith*, 3 Bibb, 465; *Tate v. Conner*, 1 Dev. Eq. 224; *Lunn v. Johnson*, 3 Ired. Eq. 70; *Cropper v. Burtons*, 5 Leigh, 426; *Coleman v. Lynes*, 4 Rand. 454; *Kirkman v. Vanlier*, 7 Ala. 217.

<sup>2</sup> *White v. Wiggins*, 32 Ala. 424;

*Savage v. Benham*, 17 Ala. 119; *Clark v. Jones*, 41 Ala. 849.

<sup>3</sup> *Attorney-General v. Steward*, 21 N. J. Eq. 340, 341; *Pugh v. Fairmount & Co. Mining Co.*, 112 U. S. 238.

<sup>4</sup> If the admitted facts are not put in issue by the bill, the complainant must amend in order to avail himself of them. *Hoff v. Burd*, 17 N. J. Eq. 201. See, also, § 99, *supra*; *Miller v. Avery*, 2 Barb. Ch. 582. A defendant to a bill who states in his answer under oath the provisions of a writing which is presumed to be in his possession cannot complain that the court acted upon his admission without the production of the writing. *Cavender v. Cavender*, 114 U. S. 464.

<sup>5</sup> *Mead v. Coombs*, 26 N. J. Eq. 173.

<sup>6</sup> *Lippincott v. Ridgway*, 11 N. J. Eq. 528.

<sup>7</sup> *Patterson v. Gaines*, 6 How. 550.

See, also, *Clay v. Towle*, 78 Me. 86;



are evidence against the defendant.<sup>1</sup> And so are the admissions in a sworn answer when the bill prays an answer without oath.<sup>2</sup> Ordinarily where the bill prays an answer without oath, the answer if sworn to is treated as if it were not;<sup>3</sup> but it is evidence against the complainant on a motion to dissolve an injunction.<sup>4</sup> The answer of a corporation under its corporate seal, which the complainant does not require to be verified by the officers of the company for the purposes of discovery, is not evidence in favor of the corporation, although it is responsive to the bill.<sup>5</sup>

**§ 389. Summary statement of the prevailing rule.**—In view of the numerous exceptions noticed in the foregoing sections to the rule which attempts to define the *quantum* of evidence required to overcome a sworn answer in equity, the law as laid down by the Supreme Court of Vermont squares with common sense and is akin to the proposition that two and two make four. “The general rule in equity upon this subject, as has often been declared, is that two witnesses, or evidence equal to that of two witnesses, is required to overcome the sworn answer of the defendant responsive to the bill. Other authorities say the rule requires one witness with corroborating circumstances. The rule has its basis in the

s. c., 2 Atl. Rep. 852; *Lindsley v. James*, 8 Cold. (Tenn.) 487; *Dunlap v. Haynes*, 4 Heisk. 479. Such an answer is a mere pleading which puts the complainant to prove his case. *Walton v. Cody*, 1 Wis. 420; *Hatch v. Eustaphieve*, Clarke's Ch. 68. But it cannot be overcome without proof. *Hanover Nat. Bank v. Klein*, 64 Miss. 141; *Buttrick v. Hadden*, 13 Met. 355; *Dugan v. Gittings*, 3 Gill, 138; *Drury v. Conner*, 6 Har. & J. 288; *Watson v. Palmer*, 5 Ark. 501; *Lawrence v. Lawrence*, 21 N. J. Eq. 817; *Union Bank v. Geary*, 5 Peters, 99, 112; *Fishell v. Bell*, Clarke's Ch. 37; *Miller v. Avery*, 2 Barb. Ch. 582. It was held in *Dascomb v. Marston*, 80 Me. 223; s. c., 13 Atl. Rep. 888, that after replication an unsworn answer is

not evidence, but that the replication may and will be waived by filing a motion to set the cause for hearing on bill and answer only, in which case the facts in the answer are taken to be true.

<sup>1</sup> *Uhlmann v. Arnholt & Co. Brewing Co.*, 41 Pa. St. 369; *Reed v. Cumberland Ins. Co.*, 36 N. J. Eq. 393, 396, and cases cited in a note thereto by the reporter “as to the general effect of complainant's waiving oath to an answer.”

<sup>2</sup> *Hyer v. Little*, 20 N. J. Eq. 443; *Symmes v. Strong*, 28 N. J. Eq. 181.

<sup>3</sup> *Sweet v. Parker*, 22 N. J. Eq. 453.

<sup>4</sup> *Walker v. Hill*, 21 N. J. Eq. 191.

<sup>5</sup> *Lovett v. Steam Saw-Mill Ass'n*, 6 Paige, 54.

fact that the answer is called out by the orator for his own use. If it admits the fact charged in the bill to be true the orator adopts this admission as sufficient proof of the fact. If the answer denies the fact charged the orator is left to establish it by other means, if he can, and at the same time the denial is evidence for the defendant. . . . But the rule as often announced respecting the effect of the answer as proof is, we think, misleading, as a careful examination of the authorities will show. The weight of evidence does not depend upon the number of witnesses that depose to given facts. The burden of proof, when an answer is responsive to the bill, devolves upon the orator to satisfy the trier that such answer is untrue; but this burden may sometimes be discharged by documentary proof or circumstantial evidence without the deposition of any witness testifying to the facts set out in the bill.<sup>1</sup> It is obvious that a sworn answer responsive to the bill stands as the deposition of one witness, and, if encountered by only one witness testifying in contradiction, and no circumstances appear affecting the case, no preponderance of proof is made out on either side, and the orator must fail because the burden of proof is upon him. But the answer considered as evidence is to be weighed precisely as it would be if it appeared in a deposition disconnected from the defendant's pleading; and the fact that the defendant is interested in the event of the suit has the same effect in discrediting his story that it does in an ordinary case at law. Again, if the answer is evasive or equivocating, it lessens its force as evidence precisely as such circumstances impair the story of a witness told on the witness stand. In short, the answer, when used as evidence, is subject to the same proper criticism and the same legal infirmities that attach to all evidence in whatsoever form it is introduced in court. All that the orator is bound to do is to meet and overcome the answer by competent proof. This proof may require one or twenty witnesses; it may be made without any.<sup>2</sup> Another rule relating to the answer as

<sup>1</sup> 2 Daniell's Ch. Pr. 840, note 2.

<sup>2</sup> "It is important to state here the true import of the rule in equity that an answer responsive to allegations and charges made in the bill, and which contains clear and positive denials, must prevail unless it is overcome by the testimony of two witnesses, or at least by one witness and attendant circumstances. . . .

evidence is important to be noticed here. The authorities all agree that the answer is evidence only when it is a direct and explicit denial of the allegations made in the bill. If it denies such allegations on information and belief it is not evidence. If the defendant sets up other matters in confession and avoidance of the charges made in the bill, such other matters are not evidence. Such allegations in the bill are mere pleadings, and if relied on by the defendant must be made out by proof if the answer is traversed.”<sup>1</sup>

§ 390. Answer of infants.—The answer of infants by their guardian is a pleading merely, and not an examination for the purpose of discovery; it is not evidence, therefore, although it is responsive to the bill and sworn to by their guardian *ad litem*.<sup>2</sup> Even the admission in a deceased heir’s answer of the will of the testator has been held not to be binding upon the infant heir who has succeeded him.<sup>3</sup>

(c) AMENDMENT OF ANSWERS.

§ 391. General rules relating to amendments.—“An application to amend an answer is addressed to the discretion of the court. In mere matters of form, clerical mistakes or verbal inaccuracies, great indulgence is shown in allowing amendments even in sworn answers. But applications to amend in material facts, or to change essentially the grounds taken in the original answer, are granted with great caution and only where it is manifest that the purposes of substantial jus-

The rule as stated has reference to an answer opposed only by the testimony of one witness. But if the evidence in the cause, no matter what it may be, is sufficient to outweigh the answer, the plaintiff may have a decree in his favor.” *Mitford’s Eq. Pl.* (Tyler’s ed., 1876) 462.

<sup>1</sup> *Veile v. Blodgett*, 49 Vt. 270, 277. See, also, *Deimel v. Brown* (Ill.), 27 N. E. Rep. 45, cited in § 376, n. 1, *supra*; *McLane v. Johnson*, 59 Vt. 237; 8 C., 9 Atl. Rep. 837.

<sup>2</sup> *Bulkley v. Van Wyck*, 5 Paige,

536; *Wright v. Miller*, 1 Sandf. Ch. 103; *James v. James*, 4 Paige, 114.

<sup>3</sup> *Story’s Equity Pleading* (10th ed.), § 871. Where infant children, by their father, file their bill alleging his inability to support them, and praying income from their estates for that purpose, the fact of their father’s ability will be inquired into and determined by the court; the admissions of the answer by the executor are not sufficient. *Tompkins v. Tompkins’ Ex’rs*, 18 N. J. Eq. 808.

tice require it.”<sup>1</sup> “To file an amended answer it should appear that the reasons for it are cogent and satisfactory; that the mistakes to be corrected or facts to be added are made highly probable, if not certain, and that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer.”<sup>2</sup>

<sup>1</sup> *Huffman v. Hummer*, 17 N. J. Eq. 269, 271, citing *Wells v. Wood*, 10 Ves. 401; *Livesey v. Wilson*, 1 Ves. & B. 149; *Smith v. Babcock*, 8 Sumn. 585; *Vandervere v. Reading*, 9 N. J. Eq. 446.

<sup>2</sup> *Foutty v. Poar*, 85 West Va. 70; s. c., 12 S. E. Rep. 1096, citing *Matthews v. Dunbar*, 8 West Va. 188; *Wyatt v. Thompson*, 10 West Va. 645; *McKay v. McKay*, 38 West Va. 736; s. c., 11 S. E. Rep. 218; *Tracewell v. Boggs*, 14 West Va. 254; *Sturms v. Fleming*, 26 West Va. 59. Ordinarily, leave to amend will be denied where the defendant knew of the facts which he wishes to introduce at the time his original answer was filed. *Suydam v. Truesdale*, 6 McLean, 459; *Webster Loom Co. v. Higgins*, 18 Blatchf. 85; *India Rubber Comb Co. v. Phelps*, 8 Blatchf. 85; *Cross v. Morgan*, 6 Fed. Rep. 241. The tests proposed by Mr. Justice Story for giving leave to amend an answer are that the reasons must be satisfactory; the facts highly probable, if not certain, and material to the controversy; that there must have been no gross negligence, and that the mistakes must have been ascertained since the putting in of the answer. *Smith v. Babcock*, 8 Sumner, 586. “There are upwards of fifty authorities upon the matter of reforming answers, and yet it will be found that the court has never been willing to go further than to permit a defendant to correct or add some single fact which had been misstated or omitted through mistake, fraud or accident.” *Vander-*

*vere v. Reading*, 9 N. J. Eq. 446, 450. See, also, *Mechanics' Bank v. Burnet Mfg. Co.*, 82 N. J. Eq. 236. United States Equity Rule 60 provides that “after an answer is put in, it may be amended as of course in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn at any time before a replication is put in or the cause set down for hearing upon bill and answer. But after replication or such setting down for hearing, it shall not be amended in any material matters, as by adding new matters, facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or judge granting the same may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer so as to be distinguishable therefrom.” “If an admission has been made in an answer improvidently and by mistake, the court will relieve the party making it from its effect by an order directing so much of the answer as contains the admission to be treated as no part of the record; but before such an order will be made, the court must be satisfied by affidavit that the admission was made under a misapprehension or by mistake. Courts exercise a

§ 392. **The same subject continued.**—The discretion to allow amendments is sparingly exercised, and generally refused when there is unreasonable delay in the application or the amendment introduces a new defense.<sup>1</sup> “Even before the production of evidence the court listens to applications to amend sworn answers with great caution, and will not, as a general rule, permit material facts prejudicial to the complainant to be added, if they were known to the defendant at the time the original answer was sworn to.”<sup>2</sup>

liberal discretion in relieving from the effect of admissions in answers under oath, which are mere pleadings and are frequently signed by counsel; but where an answer is under oath, great caution is observed. If the relief sought is from an admission of law, it may be sufficient to show that he was erroneously advised by his solicitor in that regard; but where the relief sought is from an admission of fact, it should be shown that the answer was drawn with care and attention, stating, upon information and belief, such facts as were not within the defendant's own knowledge. No court ought to relieve a party from the consequences of a reckless misstatement under oath. It should also be shown that the fact misstated was not one within the defendant's own knowledge, and that he was erroneously informed in regard to it, and made oath to the answer honestly believing such erroneous information.” *Maier v. Ball*, 89 Ill. 581, 588.

<sup>1</sup> *Pinkston v. Taliaferro*, 9 Ala. 547; *Goodwin v. McGehee*, 15 Ala. 282.

<sup>2</sup> *Marsh v. Mitchell*, 26 N. J. Eq. 498, 500, citing *Vandervere v. Reading*, 9 N. J. Eq. 446; note to *Livesey v. Wilson*, 1 Ves. & B. 149; *Bowen v. Cross*, 4 Johns. Ch. 375; *Champion v. Kille*, 1 McCart. 232; 1 *Daniell's Ch. Pr.* 778, 780. “Although courts of equity are very indulgent in allowing amend-

ments of answers in matters of form, mistake of dates, or verbal inaccuracies, it is for obvious reasons slow to allow material alterations in sworn answers. *Livesey v. Wilson*, 1 Ves. & B. 149; 1 *Daniell's Ch. Pr.* 778, and cases cited. It is especially reluctant to listen to such applications after evidence has been taken and published, *Smith v. Babcock*, 8 Sumn. 583; and at such a stage of the cause as would enable the defendant to experiment with the court so as to avoid relying at first upon an unpopular defense, such as the statute of limitations and the statute of frauds. *Cocke v. Evans*, 9 Yerg. (Tenn.) 287, 295. It has never permitted a material amendment where the application has been made merely on the ground that the defendant, at the time he put in his answer, was acting under a mistake in point of law, *Rawlins v. Powel*, 1 P. Wms. 300; *Pearce v. Grove*, 8 Atk. 522; nor when the amendment would contradict the statements in the first answer, *Greenwood v. Atkinson*, 4 Sim. 61; [*Cook v. Bee*, 2 Tenn. Ch. 348, 346]; or change the whole ground of defense, *Murdock's Case*, 2 Bland, 261; *Western Reserve Bank v. Stryker*, 1 Clarke's Ch. 880; *Campion v. McLeay*, 2 Ves. & B. 256; unless, indeed, the object be to remove out of the plaintiff's way the effect of a denial or to give him the benefit of

§ 393. The same subject illustrated.— Where a defendant in a suit *in rem* omitted to attack in his answer the validity of a co-defendant's claim, leave to amend should be readily given him unless there be special circumstances to forbid. Such an application differs essentially and radically from the application of a defendant to amend his answer so far as the complainant's claim to relief against him is concerned.<sup>1</sup> An answer containing mere clerical or accidental mistakes may be amended by supplemental answer; and so when matters have arisen or come to the knowledge of the defendant after the first answer has been put in.<sup>2</sup> An omission of the names of the parties from an unsworn answer, made by mistake of the solicitor, was held to be amendable, under the circumstances, after replication and testimony in behalf of the parties for whom it was put in as a mere pleading.<sup>3</sup> Leave was given to amend an answer to supply an omission arising from

an admission. *Edwards v. McLeay*, 2 Ves. & B. 256. The defendant must make such a case that it shall appear to be due to justice to permit the case already on record to be altered, *Third W. Sav. Bank v. Dimick*, 9 C. E. Gr. 26; or, as it has been more strongly put, he must show such circumstances as repel the notion of any attempt to evade the justice of the case, or to set up new and ingeniously contrived defenses or subterfuges. *Smith v. Babcock*, 8 Sumn. 583; *Wells v. Woods*, 10 Ves. 401. And see *Spurrier v. Fitzgerald*, 6 Ves. 548; *Huffman v. Hummer*, 2 C. E. Gr. 271. These rules are spoken of in connection with and as specially applicable to answers under oath. And certainly the rule of amendments is more strict as to sworn pleadings than to those which are only the act or words of counsel. But the reasons upon which these rules are based are equally applicable to answers put in by the parties without oath, where the oath is dis-

pensed with in accordance with law. Thus the same rules which govern the amendment of answers under oath would certainly govern similar amendments of an answer of a peer in England upon honor, a Quaker upon affirmation, or a corporation under its great seal. *Story's Equity Pleading*, §§ 874, 875a. And Lord Eldon so held in *Curling v. Marquis of Townsend*, 19 Ves. 628, where the answer was of a peer without attestation of honor. I can see no reason why these rules would not equally control where, the oath being waived under a statute, the answer is signed by the party. It is, in such case, as much the solemn averment of record of the defendant as if sworn to. See *Taylor v. Dodd*, 5 Ind. 246." Chancellor Cooper, in *Cook v. Bee*, 2 Tenn. Ch. 343, 345.

<sup>1</sup> *Smock v. Jones*, 39 N. J. Eq. 16.

<sup>2</sup> *Western Reserve Bank v. Stryker*, *Clarke's Ch.* 380.

<sup>3</sup> *McMichael v. Brennan*, 31 N. J. Eq. 496.



oversight of the solicitor who drew the answer, and which was not discovered until the cause was ready for hearing.<sup>1</sup>

**§ 394. Application to amend.**—A motion to amend a sworn answer in a material matter must be made upon notice, and be supported by affidavit,<sup>2</sup> in which the defendant should state that when he put in his answer he did not know the circumstances on which he makes the application, or any other circumstances on which he ought to have stated the fact otherwise.<sup>3</sup> “An application for leave to file a supplemental answer

<sup>1</sup> *Arnaud v. Grigg*, 29 N. J. Eq. 1, where Chancellor Runyon said:—“There is abundant precedent for allowing it. In *Nail v. Punter*, 4 Sim. 474, leave was given to a defendant to amend by stating facts she had desired to state in her answer, but which she had been prevailed upon to omit by the mistaken advice of her solicitor. So too under like circumstances in *Burgin v. Giberson*, 28 N. J. Eq. 408. In *Dagly v. Crump*, 1 Dick. 85, a defendant was allowed to amend his answer by limiting the admission of assets contained therein. The admission was most important, and was made by mistake and the carelessness of the solicitor who drew the answer. See, also, *Hughes v. Bloomer*, 9 Paige, 270, and *Curling v. Marquis Townshend*, 19 Ves. 628, and *Swallow v. Day*, 2 Col. C. C. 183. In *Fulton v. Gilmour*, 8 Beav. 154, leave was given after the cause was at issue on the paper to file a supplemental answer to correct an important date. And see s. c. on appeal, 1 Phil. 522. In *Bowen v. Cross*, 4 Johns. Ch. 375, an amendment was allowed under circumstances quite similar to those presented in this case. There appears to be no occasion for delaying the hearing by reason of the leave to amend. Unless the complainant objects, on the ground of surprise, to that course of

practice, there will under the circumstances be an order that the answer stand as if amended by setting up the instrument. *Podmore v. Skipwith*, 2 Sim. 565. If objection be made on that ground leave will be given to file a supplemental answer.”

<sup>2</sup> *Huffman v. Hummer*, 17 N. J. Eq. 269, 270; *Vandervere v. Reading*, 1 Stockt. 446; *Smith v. Babcock*, 3 Sumner, 584; *Liggon v. Smith*, 4 Hen. & Mun. 407; 3 Dan. Ch. Pr. 915; 1 Smith's Ch. Pr. 270.

<sup>3</sup> *Bell v. Hall* (1845), 5 N. J. Eq. 49; *Wells v. Wood*, 10 Ves. 401. “The defendant moved the court to be permitted to amend his answer so as to rely upon the statute of frauds as a defense. The court declined to entertain the motion unless accompanied with an affidavit showing a sufficient reason why the defense was not inserted in the original answer. *Bowen v. Cross*, 4 John. Ch. 375; *Thomas v. Doub*, 1 Md. 252; *Graham v. Skinner*, 4 Jones' Eq. 94; *McKim v. Thompson*, 1 Bland, 150. The affidavit required in such cases is obviously the affidavit of the defendant, although it may, if deemed necessary, be supplemented by that of his solicitor. The oath of the defendant cannot be dispensed with except under special circumstances. This is the rule in relation to amended and supplemental bills. *Verplanck v. Mercan-*



is made upon motion or by summons.<sup>1</sup> The summons or notice of motion must be served on the plaintiff and must specify the facts intended to be stated in the proposed supplemental answer, and be supported by affidavit verifying the truth of the proposed supplemental answer, specifically stating the facts intended to be placed on the record,<sup>2</sup> and showing a sufficient reason why they were not introduced into the original answer.<sup>3</sup> The defendant must also, it seems, produce a full copy of the intended supplementary answer for the inspection of the plaintiff."<sup>4</sup>

§ 395. At what time amendments may be allowed.— There seems to be no limit to the time within which an application to amend may be granted, so that the plaintiff may be placed in the same situation that he would have been in had the answer been correct or full enough at first.<sup>5</sup> Thus leave has been granted after replication<sup>6</sup> and after the cause has been set down for hearing.<sup>7</sup>

tile Trust Co., 1 Edw. Ch. 47, 56. And *a fortiori* it must be so as to answers." Cook v. Bea, 2 Tenn. Ch. 343, 344. An amendment will not be allowed when the complainant by affidavit shows that the new matter proposed is false. Hicks v. Otto, 17 Fed. Rep. 539.

<sup>1</sup> It seems, however, from Churton v. Frewen, L. R. 1 Eq. 238, that the application should be made by motion only.

<sup>2</sup> Curling v. Marquis Townshend, 19 Ves. 628, 631; Fulton v. Gilmore, 8 Beav. 154; Smith v. Hartley, 5 Beav. 432; Haslar v. Hollis, 2 Beav. 236. If the application be founded upon documentary evidence it must be produced. Churton v. Frewen, L. R. 1 Eq. 238.

<sup>3</sup> Tennant v. Wilsmore, 2 Anst. 362; Scott v. Carter, 1 Y. & J. 452; Smallwood v. Lewin, 2 Beas. (N. J.) 123; Smith v. Babcock, 8 Sumner, 585; Vandervere v. Reading, 9 N. J. Eq. 446.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 781;

Bell v. Dunmore, 7 Beav. 283; Fulton v. Gilmore, 8 Beav. 154.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 782; Tillinghast v. Champlin, 4 R. L. 128; Martin v. Atkinson, 5 Ga. 390; Gibson's Suits in Chancery, § 435; Furman v. North, 4 Baxt. 296. See, also, McVey v. Ely, 5 Lea, 438.

<sup>6</sup> 1 Daniell's Ch. Pr. (5th ed.) 782; Jackson v. Parish, 1 Sim. 505, 509; Raincock v. Young, 16 Sim. 122; Parsons v. Hardy, 21 L. J. Ch. 400.

<sup>7</sup> Tillinghast v. Champlin, 4 R. L. 128; Fulton v. Gilmore, 8 Beav. 154; Podmore v. Skipwith, 2 Sim. 565. But see McDougall v. Purrier, 4 Russ. 486. A defendant may be permitted to amend his answer by setting up supplemental matter at the final hearing, in order to obviate an objection, when the evidence *pro* and *con* on the matter is all before the court, and all the means for doing equity between the parties. Hamilton v. Nevada &c. Min. Co., 33 Fed. Rep. 562. In an action for an accounting it is not an abuse of discretion to per-

§ 396. **The same subject continued.**— The allowance of an amendment of the answer is in the discretion of the court. Where the defendant does not propose by the amendment to make a new defense, but merely more effectually to set up one which is already presented by the answer, the purposes of justice seem clearly to demand that the amendment, if material to the defense, be allowed; even though the cause is ready for a hearing.<sup>1</sup> And a defendant at the close of the evidence was permitted to amend his answer by the addition of words which contained no new fact, but merely modified the terms of the prayer.<sup>2</sup> So where an objection to the relevancy or competency of the testimony was made specific for the first time in the closing argument for the complainant in an equity case, the court will permit the defendant to so amend his pleadings as to obviate the objection, the testimony before the court showing a proper case therefor.<sup>3</sup>

§ 397. **Laches in applying to amend.**— The court is reluctant to allow amendments setting up new matter, as, for instance, a discharge in bankruptcy, after evidence has been taken, especially where no satisfactory reason is given for neglecting to rely on the matter in the original answer.<sup>4</sup> An application to amend a sworn answer on the ground of mistake, made two years after discovery of the same, without excuse for the delay, and upon feeble proof of the alleged mistake, was denied.<sup>5</sup> An amended answer relying upon the statute of limitations ought not to be allowed three years after the filing of the original answer, although the latter be not under oath, merely upon the affidavit of the defendant's solicitor that the original answer was filed in the absence of his client,

mit defendant to file an amended answer denying certain averments as to taxes paid after the evidence was closed. *Hibernia Sav. & Loan Soc. v. Jones*, 89 Cal. 507; s. c., 26 Pac. Rep. 1089.

<sup>1</sup> *Arnaud v. Grigg*, 29 N. J. Eq. 1, 2.

<sup>2</sup> *Rettig v. Newman*, 99 Ind. 427.

<sup>3</sup> *Hamilton v. Southern Nev. Gold &c. Co.*, 38 Fed. Rep. 562.

<sup>4</sup> *Furman v. Edwards*, 3 Tenn. Ch. 365. "An amendment to an answer

which has been sworn to by the defendant is always granted with extreme caution, and I am not aware of any case in which such amendment has been allowed after the witnesses had been examined and the proofs in the cause were closed." Chancellor Walworth in *Fulton Bank v. Beach*, 1 Paige, 429, 438.

<sup>5</sup> *Wilson v. Wintermute*, 27 N. J. Eq. 63.

and that the omission of the defense of the statute was inadvertent.<sup>1</sup> After proof taken and publication passed, an amended answer is allowed only under very special circumstances, and certainly should not be allowed where only a legal defense is set up.<sup>2</sup>

**§ 398. Amending answer upon amendment of bill.**—Where a complainant amends his bill after answer it is a matter of right for the defendant to put in a new or further answer to the amended bill, except where the amendment is a mere matter of form which cannot vary the right of the defendant.<sup>3</sup> But if the substance of the bill is amended in any manner, however trifling, the defendant may put in another answer and make an entirely new defense.<sup>4</sup> An amendment of a bill for discovery by making it one for discovery and relief justifies an amendment of the answer.<sup>5</sup>

**§ 399. Amendments setting up new matter.**—Where subsequently to the filing of the answer events have occurred which the defendant deems it necessary to set out for the purposes of his defense, he has been allowed to state them by means of a supplemental answer.<sup>6</sup> And on a bill filed to determine title to land the defendant was permitted to amend his answer so as to set up a title to the land in dispute which he acquired after his answer was filed.<sup>7</sup>

<sup>1</sup> *Wilson v. Wilson*, 2 Lea, 17.

<sup>2</sup> *Stull v. Goode*, 10 Heisk. 58. In *Ruggles v. Eddy*, 11 Blatchf. 524, the court refused to allow an amendment, after an interlocutory decree and reference to a master, withdrawing an admission in a sworn answer. After replication filed the defendant cannot put in any amended or new answer without leave of court or unless required to do so by the court, and if the same is filed without leave or requirement it will be disregarded. *Roberts v. Stigleman*, 78 Ill. 120.

<sup>3</sup> *Bowen v. Idley*, 6 Paige, 46. Where the complainant waives the putting in of a further answer to the amended bill, the defendant will not, upon a mere formal amendment

which in fact requires no further answer to protect his rights, be allowed costs of putting in a new answer to the amendments. And if he elects to put in an entirely new defense to the bill in such a case the costs of such defense must abide the event of the suit. *Trust &c. Ins. Co. v. Jenkins*, 8 Paige, 589.

<sup>4</sup> *Bosanquet v. Marsham*, 4 Sim. 573.

<sup>5</sup> *Perkins v. Hendryx*, 81 Fed. Rep. 522.

<sup>6</sup> *Stamps v. Birmingham &c. Ry. Co.*, 2 Phil. 673, 677; *Smith v. Smith*, 4 Paige, 132; *Anon.*, Hopkins' Ch. 27; *Southall v. British Mut. L. Ass. Co.*, 88 L. J. Ch. 711.

<sup>7</sup> *Barneget City Brach Ass'n v.*

§ 400. Amendment setting up usury and limitation.— As a general rule, in setting up the defense of usury, the usurious contract must be described with precision and accuracy, and proved as laid. But when the complainant voluntarily confesses the taking of usury, and there is a variance between the contract alleged and that proved, the court, in order to give the defendant the benefit of facts admitted, will direct an amendment of the answer.<sup>1</sup> Before the adoption of the New York Code of Civil Procedure it was generally held in that State that the defense of usury as well as the statute of limitations was unconscionable, and if the party let it slip the court would not relieve him,<sup>2</sup> except perhaps upon condition that he pay the amount equitably due.<sup>3</sup> And there have been several decisions to the same effect since the code.<sup>4</sup> But the rule in New York is now settled that usury and the statute of limitations are defenses based upon principles of public policy, standing on the same footing as other legal and equitable rights, such as payment, accord and satisfaction and set-off.<sup>5</sup> And the court will make no discrimination in imposing terms.<sup>6</sup>

Busby (N. J.), 20 Atl. Rep. 214, where it was contended by the complainant, on the authority of Story's Equity Pleading (10th ed.), § 903, that the cause should proceed to a hearing when it would be the duty of the court to allow the cause to stand over in order that a new bill might be filed setting up the new defense. But the court said:—"There can be nothing more absurd than to compel the parties to travel the same road twice to determine their rights, when it is known before the hearing begins that one important and perhaps vital element has been precluded from the controversy by mere matter of form."

<sup>1</sup> Cox v. Westcoat, 29 N. J. Eq. 551.

<sup>2</sup> Utica Ins. Co. v. Scott, 6 Cowen, 606; Jackson v. Murray, 1 Cowen, 136, 158; Hallagan v. Golden, 1 Wend. 804; Jackson v. Varick, 2 Wend. 294; Beach v. Fulton Bank, 8 Wend. 574; Lovett v. Cowman, 6

Hill, 223; Wolcott v. McFarlan, 6 Hill, 227. See, also, Cook v. Evans, 9 Yerg. (Tenn.) 287.

<sup>3</sup> Fulton Bank v. Beach, 1 Paige, 429. As to the statute of frauds being an unconscientious defense, see Cook v. Bee, 2 Tenn. Ch. 844.

<sup>4</sup> Osgood v. Whittlesey, 20 How. Pr. 72; Sagory v. New York & Co. R. Co., 21 How. Pr. 455; Bates v. Voorhees, 7 How. Pr. 284; Clinton v. Eddy, 37 How. Pr. 23.

<sup>5</sup> Gilchrist v. Gilchrist, 44 How. Pr. 317, where the authorities are examined; Sheldon v. Adams, 41 Barb. 54; Pike v. Bingham, 11 Reporter, 750; Arnold v. Chesebrough, 88 Fed. Rep. 571; Brown v. Mitchell, 12 How. Pr. 408; Bank of Troy v. Bassett, 3 Abb. (N. S.) 859; Catlin v. Gunter, 11 N. Y. 368; Bank of Kinderhook v. Gifford, 40 Barb. 659.

<sup>6</sup> Grant v. McCaughin, 4 How. Pr. 216.

§ 401. **Amendments at the hearing.**— Upon the hearing of a cause the court may grant the same indulgence to a defendant as it would to a plaintiff. If it appears that the defendant has not put in issue facts which he ought to have put in, and which must necessarily be in issue to enable the court to determine the merits of the case, he will be allowed to amend his answer for the purpose of stating these facts.<sup>1</sup> But the courts have been always very cautious in permitting such amendments at the hearing, and although greater liberality is allowed where the bill and answer are not verified, “the court ought not to permit answers to be changed or amended at the option of the defendant, but only when substantial justice requires it.”<sup>2</sup>

§ 402. **Amendments, how made.**— The former practice of the court was to amend the answer on file; but this has been almost entirely superseded, and the course has been adopted of filing a supplemental answer to correct any error.<sup>3</sup> “A sworn answer will not be permitted to be amended in a material particular by an amendment inserted therein. The amendment must be made by leaving the original in its present shape, and filing a supplemental answer containing the proposed amendment.”<sup>4</sup> “Where it is some mere matter of

<sup>1</sup> *Depue v. Sargent*, 21 West Va. 826, 848; *Story's Equity Pleading* (10th ed.), § 902. See, also, *Morrison v. Mayer*, 68 Mich. 288; *Laird v. Briggs*, 19 Ch. D. 22.

<sup>2</sup> *Depue v. Sargent*, 21 West Va. 826, 848. *Quære*: Whether leave would be given on the hearing to amend, or to file a supplemental answer to a suit for foreclosure of a purchase-money mortgage, to set up a defense of eviction from the mortgaged premises. *Price v. Lawton*, 27 N. J. Eq. 326. An amendment to a sworn answer by the addition of material facts known to the defendant at the time the original answer was sworn to will not be permitted on final hearing. *Marsh v. Mitchell*, 26 N. J. Eq. 498.

<sup>3</sup> *Hoffman's Ch. Pr.* (2d ed.) 241, where it is said the practice seems to apply to clerical as well as substantial errors. *Curling v. Marquis Townsend*, 19 Ves. 628; *Ridley v. Obee*, Wight. Exch. Rep. 82; *Western Reserve Bank v. Stryker*, *Clarke's Ch.* 380.

<sup>4</sup> *Huffman v. Hummer*, 17 N. J. Eq. 269, 271, citing *Dolder v. Bank of England*, 10 Ves. 284; *Wells v. Wood*, 10 Ves. 401; *Edwards v. McLeay*, 2 Ves. & B. 256; *Rowen v. Cross*, 4 Johns. Ch. 375; *Vandervere v. Reading*, 9 N. J. Eq. 449; 2 *Dan. Ch. Pr.* 918; 1 *Smith's Ch. Pr.* 270. “The courts have, under some circumstances, allowed an answer to be amended in other respects than mere form. But no case can be found

form sought to be corrected, a mistake apparent upon the face of the paper, which can be corrected without prejudice to the complainant, the objection to permitting the answer to be taken from the file in order to correct such mistake is not so serious; and yet, in such cases, the court has always acted with commendable caution, never allowing it except upon the condition that the defendant shall, immediately upon the correction being made, re-swear the answer; and it will never make such an order where the complainant can be at all prejudiced by it.”<sup>3</sup>

**§ 403. Amendments to meet views of the court.**—A defendant will not be permitted to amend his answer after the opinion of the court and the testimony have indicated in what respect it may be modified so as to effect his purpose.<sup>4</sup>

where a defendant has been permitted to take an answer absolutely off the file of the court and to substitute another in its stead.” *Vandervere v. Reading*, 9 N. J. Eq. 446, 449. But where an answer purported to be the joint and several answer of three defendants, but was signed and sworn to by only two of them, it was taken from the files with leave to the other two to erase the name of the other defendant and file it as their own. *Bailey Washing Machine Co. v. Young*, 12 Blatchf. 199. See, also, *Alpha v. Payman*, Dick. 88.

<sup>3</sup> *Vandervere v. Reading*, 9 N. J. Eq. 446, 448. No part of an answer unsworn which has been withdrawn by consent of the court upon the ground that it was written by the solicitor, and did not state the facts of the case, can be read as evidence against the defendant on the hearing of the case. *Hurst v. Jones*, 10 Lea, 8.

<sup>4</sup> *Calloway v. Dobson*, 1 Brock. (C. C.) 119, 121, 122, where Chief Justice Marshall said:—“Although courts of equity seem in general less trammelled by technical rules than courts of law, they exhibit less facility in

allowing amendments to an answer than is exhibited by courts of law in allowing amendments to pleadings. The instances are rare in which amendments to an answer have been allowed after a cause has been heard, and there has been an expression of opinion from the court. The reason is obvious. A change in the pleadings generally promotes and can seldom defeat the justice of the cause; where such change may defeat the justice of the case, a court of law invariably rejects the application for leave to amend. But in equity the answer of the defendant is testimony of the highest credit and is often conclusive. The amendment therefore may defeat the justice of the case. To allow a defendant, as a general rule, to change his answer after having discovered precisely, from the opinion of the court and the testimony in the cause, in what manner it may be modified so as to effect his purpose, would certainly be a dangerous mode of proceeding.” But in *Arnett v. Welch*, 46 N. J. Eq. 548; s. c., 20 Atl. Rep. 48, an amendment was allowed even after the an-

**§ 404. Supplemental answer.**—“The recent practice both in England and this country is not to permit an amendment to an answer after it has been sworn to and filed, except to correct a verbal or clerical mistake, or to amend or supply a formal defect, but to grant the relief applied for by permitting a supplemental answer to be filed.”<sup>1</sup> Leave will be granted to file a supplemental answer for the purpose of stating a matter which the defendant had been told by counsel would constitute no defense, and which he did not, therefore, mention to his solicitor, who prepared the answer in ignorance of the existence of such defense. But it will be granted only on such terms as will do the complainant no injury, or create no serious delay.<sup>2</sup> Leave to file a supplemental answer should be granted where the defenses proposed to be set up are an agreement by which it is alleged the defendant would be discharged from liability, the agreement not being shown by the opposing affidavits, and a prior judgment in an action in which the pleadings show a cause of action similar to the one in issue.<sup>3</sup>

**§ 405. The same subject continued.**—Leave will be granted to amend an answer only in case it clearly appears that the matter to which the amendment relates is material to the defense, and that the amendment is necessary to enable the

nouncement of the decision of the cause.

<sup>1</sup>Burgin v. Giberson, 28 N. J. Eq. 408, citing Dolder v. Bank of England, 10 Ves. 284; Bowen v. Cross, 4 Johns. Ch. 875; Vandervere v. Reading, 9 N. J. Eq. 446. Where there has been very great delay and negligence on the part of the defendant he will not be allowed to amend his answer nor to file a supplemental answer so as to delay the plaintiff. Gouverneur v. Elmendorf, 4 Johns. Ch. 857.

<sup>2</sup>Burgin v. Giberson, 28 N. J. Eq. 408, where leave was granted even after replication, and the complainant had commenced taking evidence.

<sup>3</sup>Thames &c. M. Ins. Co. v. Continental Ins. Co., 87 Fed. Rep. 286. But supplemental answers are allowed with great caution and only where there is a mistake, strictly speaking, as a matter of fact. Bowen v. Cross, 4 Johns. Ch. 875. When a supplemental answer is allowed, it is always upon equitable terms as to costs and furnishing copies *gratis*. Western Reserve Bank v. Stryker, Clarke's Ch. 890. It is error to refuse without reason leave to file a supplemental answer alleging settlement of the matter in litigation. May v. Coleman, 84 Ala. 325; s. c., 4 So. Rep. 144.



defendant to bring the merits of his defense before the court.<sup>1</sup> After a cause had been determined and affirmed on appeal, and the testimony under a reference ordered by the appellate court had been closed and the summing up had begun, a motion for leave to file a supplemental answer was denied, the only ground presented for its allowance being that defendant was advised, when he filed his answer, that the suit could not be successful.<sup>2</sup> Leave will not be granted to file a supplemental answer by way of amendment to set up a defense which will not tend to promote the ends of justice.<sup>3</sup> Thus a defense to a bill for foreclosure that the complainants in making the loan to secure which their mortgage was given were acting *ultra vires* is an unconscionable one which the court will not extend its indulgence to admit by supplemental answer.<sup>4</sup>

(d) EXCEPTIONS TO ANSWERS.

§ 406. Definition and object of exceptions.— Exceptions to an answer are of two kinds, viz., for insufficiency and for scandal and impertinence. The former lie where the answer does not sufficiently respond to the allegations and charges in the bill, and the latter where the answer contains scandalous or

<sup>1</sup> *Burgin v. Giberson*, 28 N. J. Eq. 408.

<sup>2</sup> *United R. Cos. v. Long Dock Co.*, 41 N. J. Eq. 407, holding that in such a case it must appear that hardship will result to the defendant if the permission be not accorded, and that he is not in fault for not having set up the defense in his answer originally. See, also, *Smallwood v. Lewin*, 18 N. J. Eq. 128; *Bell v. Hall*, 5 N. J. Eq. 49. The court with great difficulty permits a supplemental answer when an addition is to be put upon the record prejudicial to the plaintiff; nor will the court, as a general practice, permit a defendant to change his answer after the cause has been heard upon the evidence, and there has been any expression of opinion from the court. *Campion v. Kille*, 14 N. J. Eq. 229. See § 408, *supra*.

<sup>3</sup> *Third Avenue Savings Bank v. Dimock*, 24 N. J. Eq. 26.

<sup>4</sup> *Third Avenue Sav. Bank v. Dimock*, 24 N. J. Eq. 26. An application from a defendant to amend his answer or to file a supplemental answer so as to change the whole grounds of his defense set up in the first answer will not be entertained. *Western Reserve Bank v. Stryker*, *Clarke's Ch.* 380. An amendment to a sworn answer will not be allowed if the amendment fails to state correctly facts which are admitted to be true. *Dearth v. Hide & Leather Nat. Bank*, 100 Mass. 540. An amended answer, presenting as new matter only matter immaterial and irrelevant, ought to be rejected. *McKay v. McKay's Adm'rs*, 88 West Va. 724; s. c., 11 S. E. Rep. 218.

impertinent matter.<sup>1</sup> Exceptions are allegations in writing stating the particular points or matters with respect to which the complainant considers the answer insufficient as a response to the bill or scandalous or impertinent. The object of exceptions is to direct the attention of the court to the points excepted to and to take its opinion thereon before further proceedings are had, to the end that if the answer is insufficient a better answer may be filed, or if scandalous or impertinent that the scandalous or impertinent matter may be expunged.<sup>2</sup> Exceptions to an answer do not lie for irregularities in practice. If, for instance, the answer be defectively authenticated, the complainant's course is to have it taken from the files by a motion.<sup>3</sup> And a substantive defense not responsive to the inquiries of the bill, but consisting of new matter exclusively, is not the subject of exceptions. Exceptions only lie to an insufficient discovery or to scandal and impertinence.<sup>4</sup>

§ 407. What constitutes scandal.—Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause;<sup>5</sup> and any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous.<sup>6</sup> The same rules which determine whether matter in a bill is scandalous apply to answers and all other pleadings.<sup>7</sup> And in respect of bills, it has been said that “the sole question is whether the matter alleged to be scandalous has a tendency, or, in other words, would be admissible in evidence to shew the truth of any allegation in the bill that is material with reference to the relief that is prayed.”<sup>8</sup> An answer

<sup>1</sup> 1 Barbour's Ch. Pr. (2d ed.) 176.

<sup>2</sup> Arnold v. Slaughter (West Va.), 15 S. E. Rep. 250.

<sup>3</sup> Vermilya v. Christie, 4 Sandf. 876. The objection comes too late in the appellate court. Arnold v. Slaughter (West Va.), 15 S. E. Rep. 250; Burlew v. Quarrier, 16 West Va. 109.

<sup>4</sup> Bower Barff Iron Co. v. Wells Iron Co., 48 Fed. Rep. 891.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 847.

<sup>6</sup> *Ex parte Simpson*, 15 Ves. 476. Facts not material to the decision are impertinent, and if reproachful, scandalous. Woods v. Morrell, 1 Johns. Ch. 108.

<sup>7</sup> 1 Daniell's Ch. Pr. (5th ed.) 759. See § 109 *et seq.*, *supra*.

<sup>8</sup> Lord Selborne, L. C., in *Christie v. Christie*, L. R. 8 Ch. App. 499, 508.

which asks the court upon certain supposed general principles to declare a result in relief of the defendant "from a most unjust *a la* Shylock proceeding" is certainly impertinent and perhaps scandalous because reproachful.<sup>1</sup> It is said that an answer may be referred for scandal at the instance of a co-defendant, but not for impertinence.<sup>2</sup> It seems that there is no precise limit to the time during which an answer may be excepted to for scandal.<sup>3</sup>

**§ 408. What constitutes impertinence — Generally.**— Impertinence in pleadings consists in setting forth what is not necessary to be set forth, stuffing them with recitals and long digressions as to matters of fact wholly immaterial.<sup>4</sup> Nothing should be permitted to remain in an answer which is neither called for by the bill, nor material to the defense or with reference to any decree or order which may be made in the cause.<sup>5</sup> If the defendant sets up a distinct matter by way of avoidance, which is not called for by the bill, the same, if irrelevant or immaterial, may be excepted to for impertinence, or the complainant may have the benefit of the objection upon the hearing.<sup>6</sup> Where, however, such matter is relevant, but not stated with sufficient particularity to lay the foundation for proofs, the statements are not ground of exception for impertinence.<sup>7</sup>

holding that upon a charge of fraud allegations of other and distinct frauds are scandalous. "Nothing can be scandalous which is relevant." Cotton, L. J., in *Fisher v. Owen*, L. R. 8 Ch. D. 645, 658; *Gleaves v. Morrow*, 2 Tenn. Ch. 592, 598. But see *Attorney-General v. Hewitt*, in Chanc., July, 1801, cited in *Story's Equity Pleading*, § 862. An answer denying that a previous decree of the court was made "after full consideration," but, on the contrary, "without a full reading of the proofs in the cause, or a careful consideration of the briefs of counsel," and "without taking time to consider," and "before counsel had completed the argument," is neither impertinent

nor scandalous. *Miller v. Buchanan*, 5 Fed. Rep. 866.

<sup>1</sup> *Johnson v. Tucker*, 2 Tenn. Ch. 249.

<sup>2</sup> 1 *Barbour's Ch. Pr.* (2d ed.) 208.

<sup>3</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 759; *Booth v. Smith*, 5 Sim. 689; *Campbell v. Taul*, 8 Yer. 563.

<sup>4</sup> *Hood v. Inman*, 4 Johns. Ch. 437; *Woods v. Morrell*, 1 Johns. Ch. 103. The same rules that apply to bills apply to answers. 1 *Daniell's Ch. Pr.* (5th ed.) 759. See § 109 *et seq.*, *supra*.

<sup>5</sup> *Stafford v. Brown*, 4 Paige, 88.

<sup>6</sup> *Spencer v. Van Duzen*, 1 Paige, 555.

<sup>7</sup> *Jolly v. Carter*, 2 Edw. Ch. 209. Averments referring to facts enti-

Needless repetition is impertinence.<sup>1</sup> A repetition in a further answer to an amended bill of anything contained in a former answer which is not necessary or expedient is impertinent.<sup>2</sup> A defendant cannot be allowed to introduce irrelevant matters into his answer for the purpose of discrediting the witnesses, who, as he supposes, may be called by the complainant to sustain the suit.<sup>3</sup>

§ 409. **The same subject continued.**—The best rule to ascertain whether matter be impertinent is to see whether the subject of the allegation could be put in issue or be given in evidence between the parties.<sup>4</sup> All substantial doubts as to whether allegations of an answer are pertinent or not are to be resolved in favor of their pertinency, and nothing should be expunged which the defendant has a right to prove and which, if proved, can have any influence in deciding either whether the complainant is entitled to any relief whatever, or the nature, character or extent of the relief to which he may be entitled,<sup>5</sup> even down to the question of costs.<sup>6</sup> So if the

tling the defendant to affirmative relief are only proper for a cross-bill, and may be expunged from an answer. *Armstrong v. Chemical Nat. Bank*, 37 Fed. Rep. 466.

<sup>1</sup> *Lawrence v. Lawrence*, 4 Edw. Ch. 357; *Waring v. Suydam*, 4 Edw. Ch. 426. Matter inserted twice in an answer is impertinent unless it is necessary to qualify or explain something connected with it. *McIntyre v. Trustees &c.*, 6 Paige, 239, 247.

<sup>2</sup> *Carr v. Hill*, 6 N. J. Eq. 457.

<sup>3</sup> *Norton v. Woods*, 5 Paige, 260.

<sup>4</sup> *Woods v. Morrell*, 1 Johns. Ch. 103.

<sup>5</sup> *Van Rensselaar v. Brice*, 4 Paige, 174; *Sun Vapor &c. Co. v. City of Cedar Rapids*, 39 Fed. Rep. 698; *Balcon v. New York Ins. & Trust Co.*, 11 Paige, 454; *Desplaces v. Goris*, 1 Edw. Ch. 350; *Saltmarsh v. Bower*, 22 Ala. 221. "Where an answer makes full, frank and explicit discovery of all matters necessary or

material to be answered, whether resting in the defendant's own knowledge or on his information and belief, and it is evident that there is no design to evade a full and fair inquiry, exceptions or objections based on slight and unimportant defects, verbal criticisms or immaterial omissions will be overruled and discounted. *Baggot v. Henry*, 1 Edw. Ch. 7; *Reade v. Woodroffe*, 24 Beav. 421." *Reed v. Cumberland Ins. Co.*, 36 N. J. Eq. 393, 395.

<sup>6</sup> *Leslie v. Leslie* (N. J. Ch.), 24 Atl. Rep. 1029; *Waring v. Suydam*, 4 Edw. Ch. 426. Thus a statement in an answer introduced to show the temper with which a bill is filed and the oppressive course pursued by a complainant is not impertinent; it may have an effect upon the costs. *Desplaces v. Goris*, 1 Edw. Ch. 350. See *Lawrence v. Lawrence*, 4 Edw. Ch. 357.

plaintiff will put impertinent questions he must take impertinent answers.<sup>1</sup> Thus if a bill against executors calls specifically and particularly for accounts in all their various details, a very voluminous schedule, containing a copy from the books of account, specifying each item of debit and credit, will not be impertinent.<sup>2</sup> It will, however, depend on the reason of the thing and the nature of the case how far a general inquiry will warrant an answer leading to particular details.<sup>3</sup>

**§ 410. Impertinence illustrated.**—Where an answer contained certain formal clauses which a rule of court required to be omitted, they were held to be impertinent,<sup>4</sup> as also statements in an answer to a bill to enjoin a nuisance detailing the origin of the defendant company and various matters of a historical nature not responsive to the bill.<sup>5</sup> Where the insolvency of a defendant is positively alleged, it will amount to impertinence for another defendant to undertake to show the contrary by hypothetical statements and an opening of long-settled accounts and adjusted balances.<sup>6</sup> Where defendant filed an answer to a bill to enjoin the improper use of its railroad tracks, alleging, among other things, that complainant's house was built after the tracks were laid, that part of the answer was struck out as immaterial.<sup>7</sup> An executor, in setting forth in his answer the account or inventory of the estate which came to his hands, should not add copies of the appraiser's and executor's oaths and of the surrogate's certificate. These are merely evidence and are impertinent in pleading.<sup>8</sup> The counsel who signs a pleading containing matter grossly scandalous or impertinent is guilty of a contempt

<sup>1</sup> *Woods v. Morrell*, 1 Johns. Ch. 103; *McGuckin v. Kline*, 81 N. J. Eq. 454. Where the answer does not go beyond what is responsive to the bill, exceptions for impertinence will be overruled without taking into consideration whether the matters set forth in the portions of the answer to which the exceptions are taken are material to the final disposition of the cause. *Comstock v. Herron*, 45 Fed. Rep. 660.

<sup>2</sup> *Scudder v. Bogert* (1832), 1 Edw. Ch. 372.

<sup>3</sup> *Woods v. Morrell*, 1 Johns. Ch. 103.

<sup>4</sup> *Crammer v. Atlantic City &c. Co.*, 39 N. J. Eq. 77. See, also, *Fairchild v. Fairchild*, 43 N. J. Eq. 478; s. c., 11 Atl. Rep. 426.

<sup>5</sup> *Crammer v. Atlantic City &c. Co.*, 39 N. J. Eq. 76.

<sup>6</sup> *Jones v. Roberts*, 4 Edw. Ch. 611.

<sup>7</sup> *Angel v. Penn. R. Co.*, 38 N. J. Eq. 58.

<sup>8</sup> *Jolly v. Carter*, 2 Edw. Ch. 209.

of the court, and is personally liable to the adverse party for the costs of the proceedings to have the scandalous or impetinent matter expunged,<sup>1</sup> and an unsuccessful attempt to collect such costs from the party for whom such pleading was put in will not discharge the counsel from liability.<sup>2</sup>

§ 411. **What is not impertinent.**—It is not impertinence, in an answer by a second mortgagee to a bill for foreclosure, to aver that his mortgage is for a larger amount than is alleged in the bill, nor, in an answer thereto by the mortgagor, to aver that he has paid a specified sum on the complainant's mortgage, for which he claims credit.<sup>3</sup> A bill of discovery in aid of a defense at law must state the nature and substance of the alleged defense, and nothing contained in the answer to such a bill can be deemed impertinent which tends to disprove the existence of the alleged defense in the action at law.<sup>4</sup> An executor who is called to account is not subject to an exception for scandal and impertinence for saying in his answer that some of the property is withheld from him by a forged deed possessed by the complainant; for his silence might prejudice him thereafter.<sup>5</sup> Where a complainant avers the alienism of parties as a ground of their not being entitled under a will, it is not impertinent in a defendant, executor, to allege in his answer that the complainant (who also claims rights under the same will) is an alien;<sup>6</sup> nor to say that fraudulent and corrupt means were pursued by the complainant to procure his naturalization, and that, although he had gone through the form of becoming a citizen, he was still an alien. Where a bill against the executors and trustees under a will charged them with having delayed, neglected and refused to invest a certain sum as directed by the will, and to pay the income to the complainant, the averments in the answer that the defendants' conduct was known to and approved by the complainant, who had never, until shortly before the suit, requested the investments to be made, were held to be responsive to the bill, and not open to exceptions.<sup>7</sup>

<sup>1</sup> *Somers v. Torrey*, 5 Paige, 54.

<sup>2</sup> *Cushman v. Brown*, 6 Paige, 539.

<sup>3</sup> *Squire v. Shaw*, 24 N. J. Eq. 74.

<sup>4</sup> *Jewett v. Belden*, 11 Paige, 618.

<sup>5</sup> *Jolly v. Carter*, 2 Edw. Ch. 209.

<sup>6</sup> *Jolly v. Carter*, 2 Edw. Ch. 209.

<sup>7</sup> *Jolly v. Carter*, 2 Edw. Ch. 209.

<sup>8</sup> *Comstock v. Herron*, 45 Fed. Rep.

§ 412. The same subject continued.—Where exceptions for impertinence would mutilate the answer of the defendant unnecessarily, if allowed, by breaking off sentences or clauses which ought to stand or fall together, the exception should be disallowed.<sup>1</sup> An exception for impertinence will be overruled if the expunging of the matter excepted to will leave the residue of the clause which is not covered by the exception either false or wholly unintelligible.<sup>2</sup> A short sentence is not impertinent, although it contains no fact or material matter, and may have been inserted in the answer only from abundant caution.<sup>3</sup> When a portion of an answer contains blemishes, but the whole is not so affected, the court will refuse to strike out such portion.<sup>4</sup> Exceptions to an answer founded upon mere verbal criticism, slight defect and omission

660. In *Gleaves v. Morrow*, 2 Tenn. Ch. 592, involving exceptions to an answer, the chancellor said:—"The second exception is to a single sentence of the answer as impertinent, in which the defendants say that the complainant will never convince them or others who were acquainted with the character of their testator that the latter ever converted to his own use coupons not belonging to him. The objection is that it is the court who must be convinced, not the defendants or other parties. This is unanswerable, and the defendants' expression of opinion is irrelevant and technically impertinent. But it is not the statement of a fact which would tend to the introduction of improper evidence or embarrass the complainant in making out his case. It is a useless and harmless interjection about which the complainant need not trouble himself, and consists, to use Lord Eldon's expression, of 'two or three unnecessary words.' The third exception is for impertinence and scandal in this, that the answer characterizes the charge of the bill that respondent's testator converted complainant's coupons to

his own use as a 'vile aspersion' upon the fair name of the deceased, and reiterates that it 'could only have been hatched up' for the purpose of reimbursing the complainant for losses occasioned by his own official delinquencies. But it is obvious that character is directly in issue upon the allegations of the bill. In the light of the authorities I cannot say that the matter excepted to as scandalous is not relevant to the issues which implicate character and may turn upon motives."

<sup>1</sup> *Franklin v. Keeler*, 4 Paige, 382. Cf. *Norton v. Woods*, 5 Paige, 260.

<sup>2</sup> *McIntyre v. Trustees &c.*, 6 Paige, 289; *German v. Machin*, 6 Paige, 288, 293.

<sup>3</sup> *Desplaces v. Goris*, 1 Edw. Ch. 850. The complainant cannot except to a part of the defendant's answer as impertinent which refers to and explains the meaning of a schedule annexed to such answer, without also excepting to the schedule itself as impertinent. *McIntyre v. Trustees &c.*, 6 Paige, 289.

<sup>4</sup> *Grey v. Bowman* (N. J.), 13 Atl. Rep. 226.



of immaterial matter will be invariably disallowed and treated as vexatious.<sup>1</sup> Where the impertinence consists of a few useless or impertinent words here and there the court will pro-

<sup>1</sup> *Baggot v. Henry*, 1 Edw. Ch. 7. "Strictly speaking, every statement in pleading beyond the naked facts relied on is impertinent. This is strikingly illustrated in *Woods v. Woods*, 10 Sim. 197, 215. There the bill in quoting certain clauses of a will in which several of the words were misspelled prefaced them by saying that they were 'in the words and figures hereinafter set forth, the inditing and spelling thereof being set forth with the greatest accuracy.' Upon exception the Vice-Chancellor was of opinion that if he proceeded rigidly the prefatory words were impertinent, 'because,' said he, 'if it was necessary to set out the will with all its errors it would have been sufficient to allege that the testator made his will as follows and then to have set out the will.' It is obvious that such exceptions, however technically correct, could not possibly be allowed; and so it was held in *Del Pont v. Tastet*, 1 Turn. & R. 486. There the bill contained translations of certain letters of the defendant written originally in French or Spanish, each of which was prefaced with these words:— 'According to an accurate translation of such letter into the English language, he, the defendant, expressed himself in the words and figures or to the purport and effect following.' The defendant excepted to the clause 'according to an accurate translation of such letter into the English language,' and also to the clause 'in the words and figures or,' as impertinent. The effect of striking out these clauses would be to make the prefatory sentence read thus:— 'He, the defendant, expressed himself to the purport and effect fol-

lowing,' which it must be admitted was a sufficient statement of the fact. Upon these exceptions Lord Eldon remarked:— 'To say that because there are here and there two or three unnecessary words it is making a right use of a rule to prevent oppression to refer the bill for impertinence is a thing the court ought not to endure.' So in regard to an answer for insufficiency Vice-Chancellor McCoun, in *Baggot v. Henry*, 1 Edw. Ch. 7, lays down the proper practice thus:— 'I wish to have it understood that while on the one hand I shall always hold a defendant to a full, frank and explicit disclosure of all matters material or necessary to be answered, whether resting within his own knowledge or upon his information and belief, so on the other hand I mean as far as lies in my power to discourage the taking of those exceptions which are founded upon mere verbal criticism, slight defect or omission of any matter not material to the cause, and when it is evident the defendant can have no design or intention to suppress the truth or evade a full and fair answer. Whenever exceptions of the latter character are brought before me I shall not hesitate to overrule them and impose the payment of all such costs as a litigious and vexatious proceeding deserves.' These rulings, on exceptions for impertinence and insufficiency, are manifestly sound and healthy expositions of the proper practice. The object of such exceptions is to secure a substantial benefit, and whenever this object is not kept in view they should be treated as frivolous. Especially should this be so in a State where so far as impertinent

vide a remedy in the adjustment of costs.<sup>1</sup> Where facts are distinctly put in issue by the pleadings the examiner cannot reject evidence which is material to prove such facts on the ground that the matters put in issue are immaterial.<sup>2</sup> Nor will the court, upon a motion to expunge testimony taken by an examiner, decide the question whether a particular allegation in the bill or answer is pertinent or impertinent. Upon the hearing of the cause, however, the court will disregard the impertinent allegation as well as the proof in relation to the same.<sup>3</sup>

**§ 413. Exceptions for insufficiency.**—Exceptions for insufficiency can only be sustained where some material allegation, charge or interrogatory in the bill is not fully answered.<sup>4</sup> Where the matter of the bill is fully answered, and the defendant sets up new matter which is irrelevant and forms no

matter is concerned a rigid enforcement of the rules is not necessary, in Lord Eldon's words, to prevent oppression in the way of costs. Exceptions for simple impertinence ought neither to be taken nor allowed unless the irrelevant passage would tend to the introduction of improper evidence by the putting facts in issue which are foreign to the cause or where the irrelevant matter might embarrass the opposite party in making out his case." *Gleaves v. Morrow*, 2 Tenn. Ch. 592, 594. See, also, *United States v. McLaughlin*, 24 Fed. Rep. 823.

<sup>1</sup> *United States v. McLaughlin*, 24 Fed. Rep. 823.

<sup>2</sup> *Putnam v. Ritchie*, 6 Paige, 390.

<sup>3</sup> *Putnam v. Ritchie*, 6 Paige, 390.

<sup>4</sup> *Stafford v. Brown*, 4 Paige, 88. The court will not examine an answer to see whether it is sufficient or not except after a reference for insufficiency. *Davis v. Davis*, 2 Atk. 24; *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 599, 604. Plaintiff cannot, on motion, compel the answer of interrogatories. The matter

should be brought up by exceptions to the answer. *Fuller v. Knapp*, 24 Fed. Rep. 100. "Such exceptions are usually very much to the disadvantage of the party resorting to them. A defendant is often pressed to a direct denial, which constitutes proof of his case in his favor which must be overthrown by the testimony of two witnesses or equivalent proof on the part of the complainant." *Sawyer, C. J., in United States v. McLaughlin*, 24 Fed. Rep. 823, 825, where the opinion is expressed that since the adoption of United States Equity Rules 41-43 a general interrogatory is not sufficient to sustain an exception for insufficiency. Defects in an answer are not cured by not excepting to it. Its defectiveness will have its influence over the cause though exceptions to it were not taken. *Doughty v. Doughty*, 7 N. J. Eq. 227. See, also, *Pierce v. Brown*, 7 Wall. 205. By excepting for insufficiency the complainant necessarily assumes that the answer is valid and properly before the court. *Vermilya v. Christie*, 4 Sandf. Ch. 376.

sufficient grounds of defense, the complainant may except to the answer for impertinence, but he cannot except to it for insufficiency.<sup>1</sup> If the further answer which is called for by the complainant's exceptions can be of no possible use to him, the first answer is sufficient, and the exceptions cannot be sustained.<sup>2</sup> An exception for insufficiency to an answer will not lie on account of a mere neglect of the defendant to answer as to the correctness of a simple arithmetical proposition which is stated in the complainant's bill.<sup>3</sup> Where the answer is accompanied by a plea or demurrer to a part of the discovery sought, if the complainant excepts to the answer before the plea or demurrer has been disposed of, he admits the validity of the plea or demurrer.<sup>4</sup> Where a demurrer to a bill is accompanied by an answer, although such answer merely denies combination, and the demurrer is overruled, if the complainant wants a further answer he must file exceptions to the answer already put in.<sup>5</sup> Where a bill for relief merely contains no demand for an answer general or specific to certain allegations, an exception to an answer omitting to notice them will be overruled.<sup>6</sup> If a plea or demurrer to the whole bill is overruled, the defendant must, if interrogatories have been filed, answer, without the plaintiff being driven to except; but where a partial plea or demurrer is overruled, the plaintiff must except, because, an answer being on the file, the defendant is not bound to answer further till exceptions have been taken.<sup>7</sup> Where a plea is accompanied by an an-

<sup>1</sup> *Stafford v. Brown* (1838), 4 Paige, 88; *Spencer v. Van Duzen*, 1 Paige, 555.

<sup>2</sup> *Davis v. Mapes*, 2 Paige, 105. See, also, *Fay v. Jewett*, 2 Edw. Ch. 828; *Heugh v. Garrett*, 44 L. J. Ch. 805; *Lockett v. Lockett*, L. R. 4 Ch. 836, 841; *Reade v. Woodroffe*, 24 Beav. 421; *Elmer v. Creasy*, L. R. 9 Ch. 69.

<sup>3</sup> *McIntyre v. Trustees &c.*, 6 Paige, 289.

<sup>4</sup> *Siffkin v. Manning* (1841), 9 Paige, 222; *Brownell v. Curtis*, 10 Paige, 210, 211; *Foley v. Hill*, 8 Myl. & Cr. 475. See *Darnell v. Reyney*, 1 Vern. 844.

<sup>5</sup> *Many v. Beekman Iron Co.* (1841), 9 Paige, 188, 194; *Cotes v. Turner*, Bunb. 128.

<sup>6</sup> *United States v. McLaughlin*, 24 Fed. Rep. 828, 825. The doctrine that exceptions to the answer for insufficiency are confined to cases where complainants are compelled to rely on defendants to prove their case, and are not properly taken where all the matters concerning which complainants ask discovery are of record, does not apply to bills for relief. *McClaskey v. Barr*, 40 Fed. Rep. 559.

<sup>7</sup> 1 *Daniell's Ch. Pr.* (5th ed.) 761.

swer to the interrogatories, the plaintiff may, upon the allowance of the plea, except to the answer, as he may if a partial plea is overruled.<sup>1</sup> If a plea is ordered to stand for an answer with liberty to except, the plaintiff may file exceptions to the answer or to that part of it to which he is by the order permitted to except; but he cannot except unless liberty to do so be expressly given by the order.<sup>2</sup>

**§ 414. The same subject continued.**—When the complainant allows the time fixed by rule of court for setting down exceptions filed to an answer for scandal, impertinence and insufficiency to pass by, and the court, after examining the exceptions, is of opinion that the cause will be more speedily determined by a withdrawal of the exceptions, the time will not be enlarged, though good cause be shown, but the complainant will be allowed to withdraw the exceptions and reply to the answer.<sup>3</sup>

**§ 415. When exceptions for insufficiency do not lie.**—Where an answer is under oath exceptions for insufficiency will not lie, because such an answer is not evidence for the party making it.<sup>4</sup> Such an answer can be excepted to only for scandal or impertinence.<sup>5</sup> For the same reason exceptions will not lie to the answer of a corporation under its corporate

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 761.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 761.

<sup>3</sup> American Loan & Trust Co. v. East & West Ry. Co., 40 Fed. Rep. 384. The court may allow the filing of exceptions to the answer, an amendment of the bill, and require an answer to the amendment and to the exceptions all at the same time. Kittredge v. Claremont Bank, 8 Story, 590. After a reference for impertinence exceptions for insufficiency may be filed. Patriotic Bank v. Bank of Washington, 5 Cranch, C. C. 602. But in such case the latter will be deemed a waiver of the former. And an answer cannot be referred

ciency. Story's Equity Pleading (10th ed.), § 867.

<sup>4</sup> Fulton County v. Miss. &c. R. Co., 21 Ill. 366; Brown v. Mortgage Co., 110 Ill. 238; McCormick v. Chamberlain, 11 Paige, 543; Goodwin v. Bishop (Ill.), 84 N. E. Rep. 47; Vermilyea v. Christie, 4 Sandf. Ch. 376, 377; Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 599; Carpenter v. Benson, 4 Sandf. Ch. 496; Sheppard v. Akers, 1 Tenn. Ch. 326. But the rule is otherwise in New Jersey. Reed v. Cumberland Ins. Co., 36 N. J. Eq. 393, 397; Ryan v. Anglesea R. Co. (N. J.), 12 Atl. Rep. 539.

<sup>5</sup> Mix v. People, 116 Ill. 267; Brown v. Scottish-American Mortgage Co., 110 Ill. 235; Fulton County v. Miss. &c. R. Co., 21 Ill. 366.

seal;<sup>1</sup> nor to the answer of a peer upon protestation of honor;<sup>2</sup> nor to the answer of the attorney-general;<sup>3</sup> nor to the answer of an infant.<sup>4</sup>

**§ 416. Exceptions to answer to amended bill.**—Where a complainant amends his bill after answer he is thereby deemed to admit the sufficiency of the answer.<sup>5</sup> Hence if he neglects to except to the answer to his original bill, or his exceptions thereto have been overruled, he cannot except to the answer to his amended bill for insufficiency upon the ground that the original bill was not fully answered,<sup>6</sup> unless the defendant, after being duly called upon to file his answer to the bill as amended, or voluntarily waiving such call, chooses to let his original answer stand as an answer to the amended bill.<sup>7</sup> So if the amended bill states an entirely new case, exceptions will lie although some of the interrogatories embraced in them

<sup>1</sup> *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 599; *United States v. McLaughlin*, 24 Fed. Rep. 828; *Wallace v. Wallace*, Halst. (N. J.) Dig. 178.

<sup>2</sup> *Hill v. Earl of Bute*, 2 Fowl. Ex. Pr. 11.

<sup>3</sup> *Davison v. Attorney-General*, 5 Price, 898, n.; *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 599.

<sup>4</sup> *Copeland v. Wheeler*, 4 Bro. C. C. 256; *Lucas v. Lucas*, 18 Ves. 274; *Bulkley v. Van Wyck*, 5 Paige, 586; *Leggett v. Sellon*, 3 Paige, 84.

<sup>5</sup> 1 Daniell's Ch. Pr. (5th ed.) 762. Exceptions are superseded by an amendment pending a decision upon them, *De la Torre v. Bernales*, 4 Mod. 896, except where the amendment does not relate to the merits. *Miller v. Wheatley*, 1 Sim. 296; *Taylor v. Wrench*, 9 Ves. 815.

<sup>6</sup> *Chazournes v. Mills*, 2 Barb. Ch. 466; *Overy v. Leighton*, 2 Sim. & Stu. 234; *Wich v. Parker*, 22 Beav. 59; s. c., 2 Jur. (N. S.) 582; *Denis v. Rochussen*, 4 Jur. (N. S.) 298. In *Glassington v. Thwaites*, 2 Russ. 458, 464, the rule was departed from un-

der peculiar circumstances. Where the complainant, after excepting to the answer of the defendant and submitting to the master's report thereon, files an amended bill asking for discovery, without making any new case entitling him to a further discovery, the proper course for the defendant—if the discovery sought is not wholly immaterial, so as to make it a proper subject of demurrer—is to answer the amended bill without reference to the discovery sought. And then if the complainant excepts to his answer for insufficiency upon that ground, he may move to take the exceptions off the files for irregularity; or he may insist before the master, upon the reference of the exceptions, that such exceptions relate to the matters of the original bill only; or that the principle upon which the discovery is sought has been decided against the complainant upon the reference of the exceptions to the original answer. *Chazournes v. Mills*, 2 Barb. Ch. 466.

<sup>7</sup> *Angel v. Penn. R. Co.*, 87 N. J. Eq. 92.

were contained in the original bill.<sup>1</sup> And where the answer to the amended bill stated facts similar to those contained in the first answer, not called for by the amendments, and omitting the material circumstances discovered in the first answer, the complainant, upon special application for leave, was permitted to except for insufficiency.<sup>2</sup> If the answer to the amendments also undertakes to answer former exceptions, but is not sufficient in either respect, the complainant may file new exceptions based on the new matter, which, if not submitted to, should be referred together with such of the old exceptions as are not sufficiently answered.<sup>3</sup> New exceptions should be entitled, "exceptions taken by the complainant to the answer of the defendant C. D. to the complainant's bill of complaint," or "to the answer, etc., to the amendments to the original bill of complaint of the complainant."<sup>4</sup>

§ 417. Procedure upon exceptions.—The method of disposing of exceptions differs in various jurisdictions. In the English chancery they were referred to a master in the first instance.<sup>5</sup> The same practice prevailed in the New York court of chancery<sup>6</sup> and still obtains in Tennessee.<sup>7</sup> In the

<sup>1</sup> *Mazarredo v. Maitland*, 3 Mad. 66, 72; *Partridge v. Haycraft*, 11 Ves. 570, 581. "The general rule of the court is that if the answer is insufficient the complainant must raise all his objections thereto in the first instance; and he will not be permitted to raise any objections to the second answer which were not made by exceptions to the first." *Eager v. Wiswall*, 2 Paige, 369, 371.

<sup>2</sup> *Irvine v. Viana*, M'Clel. & Y. 568.

<sup>3</sup> *Bennington Iron Co. v. Campbell*, 2 Paige, 160.

<sup>4</sup> *Bennington Iron Co. v. Campbell*, 2 Paige, 161. In *Williams v. Davies*,

1 Sim. & Stu. 426, exceptions irregularly entitled were ordered to be taken off the file.

<sup>5</sup> Hoffman's Ch. Pr. (2d ed.) 247. But it was otherwise at the equity side of the exchequer, where they were heard by the court upon argument. 2 Fow. Ex. Pr. 1, 2.

<sup>6</sup> Hoffman's Ch. Pr. (2d ed.) 247; Barbour's Ch. Pr. (2d ed.) 186. As to taking out and serving an order of reference, see *Peale v. Bloomer*, 8 Paige, 78; *Summers v. Murray*, 2 Edw. Ch. 205; *Hall v. Wood*, 1 Paige, 404. As to master's report upon exceptions, see *Corning v. Cooper*, 7

<sup>7</sup> Gibson's Suits in Chancery, § 422. Exceptions to an answer in South Carolina may be heard and determined by the court. *Satterwhite v.*

*Davenport*, 10 Rich. Eq. (S. C.) 305. See, also, *Camden &c. R. Co. v. Stewart*, 19 N. J. Eq. 843.

federal courts "after an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day<sup>1</sup> to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose upon cause shown to the court or a judge thereof; and, if no exceptions shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient."<sup>2</sup> "Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter before a judge of the court, and shall enter as of course in the order book an order for that purpose. And, if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court or any judge thereof may for good cause shown enlarge the time for filing exceptions,<sup>3</sup> or for answering the same in his discretion upon such terms as he may deem reasonable."<sup>4</sup> "If at the hearing the exceptions shall be allowed, the defendant shall be bound to put in a full and complete

Paige, 587; Burrell v. Nicholson, 6 Sim. 212; Davenport v. Whitmore, 8 Sim. 251; Wynne v. Jackson, 2 Sim. & Stu. 226; Rushton v. Troughton, 2 Sim. 83. As to exceptions to master's report, see Myers v. Bradford, 4 Johns. Ch. 484; Foote v. Van Ranst, 1 Hill Ch. 185; Byington v. Wood, 1 Paige, 145; Crispe v. Nevil, 1 Ch. Cas. 60; Mackie v. Cairns, Hopk. Ch. 9. Form of exceptions to report, see Wilkes v. Rogers, 6 Johns. 566; Caudler v. Pettit, 1 Paige, 427; Franklin v. Hunt, 4 Paige, 882; Noble v. Wilson, 1 Paige, 164; Craven v. Wright, 2 P. Wms. 181; Cotham v. West, 2 Atk. 182; Byington v. Wood, Hopk. Ch. 98; Higbie v. Brown, 1 Barb. Ch. 820. Filing exceptions to report, see Stafford v. Rogers, Hopk. Ch. 98; Myers v. Bradford, 4 Johns. Ch. 484;

Weber v. Weitling, 18 N. J. Eq. 89. Hearing of exceptions to report, see Byington v. Wood, 1 Paige, 145; Kilbee v. Sneyd, 2 Moll. 239; New York Fire Ins. Co. v. Lawrence, 6 Paige, 511; Eager v. Wiswall, 2 Paige, 869. Costs on exceptions to report, see Richards v. Barlow, 1 Paige, 828. Costs on exceptions generally, see Richards v. Barlow, 1 Paige, 188; Norton v. Woods, 5 Paige, 200; Richards v. Barlow, 1 Paige, 828; Jolly v. Carter, 2 Edw. Ch. 209.

<sup>1</sup> See Read v. Consequa, 4 Wash. (C. C.) 835.

<sup>2</sup> Equity Rule 61.

<sup>3</sup> Under special circumstances the time may be limited. Read v. Consequa, 4 Wash. (C. C.) 835.

<sup>4</sup> Equity Rule 63.



defense thereto on the next succeeding rule-day; otherwise the plaintiff shall as of course be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or at his election he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant when he is in custody upon such writ shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.”<sup>1</sup> “If upon argument the plaintiff’s exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby unless otherwise directed by the court or the judge thereof at the hearing upon the exceptions.”<sup>2</sup>

§ 418. The same subject continued.—The procedure upon exceptions to answers for scandal and impertinence is similar to that on exceptions to bills on the same grounds.<sup>3</sup> The English practice upon finding impertinence in a pleading seems to be to order it to be expunged and leave it to the objecting party to see that the order is actually executed.<sup>4</sup> In Tennessee, where a general appeal in chancery carries up the entire record for revision and no immediate appeal lies from an interlocutory order, it was declared to be the better practice to make an order considering it as executed until reversed, or at most expunge by drawing lines around the impertinent matter, or otherwise designating it without in fact striking it out; but that in a case of clear scandal the court would direct the actual expunging, leaving the opposite

<sup>1</sup> Equity Rule 64.

<sup>2</sup> Equity Rule 65. Where the complainant allows the time fixed by rule of court for setting down exceptions to the answer for impertinence and insufficiency to pass by, and the court after examining the exceptions is of opinion that the cause will be more speedily determined by a withdrawal of the exceptions, the time will not be enlarged, though good

cause be shown, but the complainant will be allowed to withdraw the exceptions and reply to the answer. *American L. & T. Co. v. E. & W. Ry. Co.*, 40 Fed. Rep. 384.

<sup>3</sup> 1 Barbour’s Ch. Pr. (2d ed.) 201. See § 112, *supra*.

<sup>4</sup> *Davis v. Cripps*, 7 Y. & C. (C. C.) 443; *Raphael v. Birdwood*, 1 Swans. 282.

party to his remedy by bill of exceptions.<sup>1</sup> Where the master proceeds *ex parte* it is his duty nevertheless to examine the exceptions with as much care as if they were litigated before him by the parties.<sup>2</sup>

**§ 419. Further answers.**—A further answer upon exceptions sustained is in every respect similar to and is considered as part of the answer to the original bill.<sup>3</sup> Therefore if the defendant, in a further answer, repeats anything contained in a former answer, the repetition, unless it varies the defense in point of substance, or is otherwise necessary or expedient, will be considered as impertinent.<sup>4</sup> But if the defendant discovers that parts of the bill to which the exceptions are not taken are not fully answered, he may in his further answer to the exceptions answer those parts of the bill which are not covered by the exceptions or by his former answer.<sup>5</sup> And it seems that he may set up any new matter of defense which has arisen since the filing of his original answer.<sup>6</sup> The title of a second answer must correspond with the order under which it is put in, and if there are no amendments it should be entitled, “The further answer of the defendant, C. D., to the original bill of complaint of the complainant.” If there are amendments it should be, “The further answer of the defendant, C. D., to the original bill of complaint, and the answer of the same defendant to the amended bill of the complainant.”<sup>7</sup>

<sup>1</sup> Johnson v. Tucker, 2 Tenn. Ch. 244, 250.

<sup>2</sup> Byington v. Wood, 1 Paige, 146.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 868; Cooper's Eq. PL 321, 322. It is prepared, signed and filed in the same manner as the original answer. Barbour's Ch. Pr. (2d ed.) 197. An order may be entered for a further answer upon exceptions for insufficiency submitted to before exceptions taken at the same time for impertinence are disposed of. Lawrence v. Lawrence, 4 Edw. Ch. 857. Where there has been one reference on exceptions to an answer, if a second or

third answer is referred for insufficiency on the old exceptions it should be referred to the same master if he remains in office and is competent to act in the case. Leggett v. Dubois, 8 Paige, 477.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 868; Smith v. Serle, 14 Ves. 415, holding that the costs of expunging such matter are in strictness to be paid by the counsel who signed the answer.

<sup>5</sup> Alderman v. Potter, 6 Paige, 658.

<sup>6</sup> Alderman v. Potter, 6 Paige, 658.

<sup>7</sup> Bennington Iron Co. v. Campbell, 2 Paige, 160.

§ 420. **Form of exceptions.**—Exceptions to an answer must be in writing<sup>1</sup> and signed by counsel<sup>2</sup> and properly entitled.<sup>3</sup> They must point out specifically the matters or interrogatories which are not sufficiently answered by separate exceptions applicable to each part,<sup>4</sup> stating the substance at least of the charge or interrogatory referred to.<sup>5</sup> Exceptions consisting of general objections to an answer which is clearly good in part are defective.<sup>6</sup> Where impertinent matter is referred to only as set forth on certain specified pages and lines of the answer it is not sufficient, certainly on appeal, as the paging may not be preserved in the record so as to enable the appellate court to determine whether the exceptions are properly sustained or disallowed.<sup>7</sup> There is no such term as “ambiguous” known in equity practice with reference to pleading except in so far as it may be embraced in the term “insufficient.” Thus where a certain portion of the answer is alleged to be impertinent, indefinite and ambiguous, the only point is that the allegations referred to are impertinent.<sup>8</sup> Exceptions to an answer for insufficiency which are themselves insufficient may be struck off the files on motion, but it is not too late to object to them when they are noticed for argument upon the master’s report.<sup>9</sup> If the defend-

<sup>1</sup> Beames’ Ord. 78, 181; *De la Torre v. Bernales*, 4 Mad. 896.

<sup>2</sup> *Yates v. Hardy*, Jacob, 228; *Candler v. Partington*, 6 Mad. 122; *Taylor v. Wrench*, 9 Ves. 815.

<sup>3</sup> *Williams v. Davies*, 1 Sim. & Stu. 426.

<sup>4</sup> 1 *Daniell’s Ch. Pr.* (5th ed.) 764; *Brooks v. Byam*, 1 Story (C. C.), 296; *Fulton County v. Miss. & C. R. Co.*, 21 Ill. 838, 866; *Baker v. Kingsland*, 8 Edw. Ch. 138. Exceptions to an answer cannot avail the complainant on motion to dissolve an injunction on bill and answer, unless such exceptions point out a failure to answer the ground of equity on which the injunction was allowed. *Stitt v. Hilton*, 31 N. J. Eq. 285, 289.

<sup>5</sup> *Stafford v. Brown*, 4 Paige, 89, 90; *Hodgson v. Butterfield*, 2 Sim. &

Stu. 286; *Woodrofe v. Daniel*, 10 Sim. 243; *Brown v. Keating*, 2 Beav. 581, 588; *Esdale v. Molyneaux*, 1 De G. & S. 218; *Duke of Brunswick v. Duke of Cambridge*, 12 Beav. 279, 280; *Brooks v. Byam*, 1 Story (C. C.), 296. Exceptions which fail to state the charges in the bill to which the answer is addressed and the exact terms of the answer are too general to be considered. *Bower Barff Iron Co. v. Wells Iron Co.*, 43 Fed. Rep. 391.

<sup>6</sup> *Mutual L. Ins. Co. v. Cokefair*, 41 N. J. Eq. 142. See, also, *Conway v. Wilson*, 44 N. J. Eq. 457; s. c., 11 Atl. Rep. 734.

<sup>7</sup> *Mix v. People*, 116 Ill. 287.

<sup>8</sup> *United States v. McLaughlin*, 24 Fed. Rep. 823.

<sup>9</sup> *Baker v. Kingsland*, 8 Edw. Ch.

ants answer separately, exceptions must be taken to each answer;<sup>1</sup> but if jointly and severally, only one set of exceptions can be filed.<sup>2</sup>

188. After exceptions have been delivered no new exceptions can regularly be added. *Partridge v. Haycraft*, 11 Ves. 575. But liberty to amend exceptions may be given upon special cause shown. *Dolder v. Bank of England*, 10 Ves. 284; *Bancroft v. Wentworth*, 10 Ves. 285, n.; *Northcote v. Northcote*, 1 Dick. 22.

<sup>1</sup>*Sydolph v. Monkston*, 2 Dick. 609; *Thomas v. Thomas*, 2 Fowler, 10.

<sup>2</sup>*Thornly v. Jones*, 2 Fowler, 10. Exceptions for impertinence must be

supported *in toto* or fall altogether, and an exception will be overruled if it includes any one passage which is not impertinent. *Desplaces v. Goris*, 1 Edw. Ch. 850; *Waring v. Suydam*, 4 Edw. Ch. 426; *Balcom v. New York Ins. & Trust Co.*, 11 Paige, 454; *Van Rensselaer v. Brice*, 4 Paige, 174; *Tench v. Cheese*, 1 Beav. 571. But the rule is otherwise with regard to exceptions for insufficiency. *East India Co. v. Campbell*, 1 Ves. 247; *Hoffman v. Postill*, L. R. 4 Ch. App. 678.

## CHAPTER XII.

### CROSS-BILLS.

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| <p>§ 421. Definition and object of a cross-bill.</p> <p>422. Where relief sought is available by answer.</p> <p>423. Supplemental answer, cross-bill or petition.</p> <p>424. Jurisdiction of cross-bills.</p> <p>425. Equitable relief on cross-bills.</p> <p>426. Cross-bill necessary for affirmative relief.</p> <p>427. The same subject continued — Federal practice in removed cases.</p> <p>428. Affirmative relief by a conditional decree.</p> <p>429. Account and specific performance on an answer.</p> <p>430. Decree between co-defendants without a cross-bill.</p> <p>431. Who may file a cross-bill.</p> <p>432. Cross-bills by direction of the court.</p> | <p>§ 433. Relation of cross and original bill as to subject-matter.</p> <p>434. Departure from the original subject-matter.</p> <p>435. When germane to the original subject-matter.</p> <p>436. Parties to cross-bills.</p> <p>437. Leave to file a cross-bill.</p> <p>438. Time for filing a cross-bill.</p> <p>439. The same subject continued.</p> <p>440. Evidence on bill and cross-bill.</p> <p>441. Staying proceedings on the original bill.</p> <p>442. The same subject continued.</p> <p>443. Frame of a cross-bill.</p> <p>444. The same subject continued.</p> <p>445. Process upon cross-bill.</p> <p>446. Original and cross-bill as one cause.</p> <p>447. Effect of dismissal of the original bill.</p> <p>448. Miscellaneous irregularities and waiver.</p> |
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**§ 421. Definition and object of a cross-bill.**— A cross-bill is a bill brought by a defendant in a suit against the complainant in the same suit, or against the other defendants in the same suit,<sup>1</sup> or against both, touching the matters in question in the original bill. It is usually brought either (1) to obtain a necessary discovery of facts,<sup>2</sup> (2) to bring before the court new matter in aid of the defense to the original bill, or (3) to obtain full relief for all the parties, or (4) some affirmative relief touching the matters of the original bill.<sup>3</sup>

<sup>1</sup> *Armstrong v. Pratt*, 2 Wis. 299; *Vanderveer v. Holcomb*, 21 N. J. Eq. 105.

<sup>2</sup> *Chester Iron Co. v. Beach*, 40 N. J. Eq. 68.

<sup>3</sup> *Gibson's Suits in Chancery*, § 662; *Richards v. Todd*, 127 Mass. 167; *Morgan's Co. v. Texas Cent. Ry. Co.*, 137 U. S. 172, 201; *Gregory v. Pike*, 29 Fed. Rep. 588; *Hughey v. Brat-*

§ 422. Where relief sought is available by answer.—“If the facts which a defendant wishes to set up destroy the plaintiff's apparent cause of action, they constitute a defense, and should be set up by answer or plea; but if they only furnish a reason why the court should make a decree depriving the plaintiff of his cause of action, they must be set up by a cross-bill.”<sup>1</sup> A cross-bill will be dismissed with costs where it seeks no discovery and makes no defense which was not equally available by way of answer to the original bill,<sup>2</sup> or by amendment to the answer.<sup>3</sup>

§ 423. Supplemental answer, cross-bill or petition.—Under the old practice, which has not been wholly superseded,

ton, 48 Ark. 167; *Cleveland v. Chambliss*, 64 Ga. 352; *Weisman v. Smith*, 6 Jones' (N. C.) Eq. 124. It cannot be treated as an answer. *Chicago &c. Ry. Co. v. Third Nat. Bank*, 184 U. S. 276. But see *McClaskey v. Barr*, 48 Fed. Rep. 130, 137. The defendant is not bound to file a cross-bill unless directed by the court. He may proceed by an independent suit. *Sharon v. Hill*, 22 Fed. Rep. 28; *McClaskey v. Barr*, 48 Fed. Rep. 130, 135; *Washburn & Moen Mfg. Co. v. Scutt*, 22 Fed. Rep. 710. A stale claim cannot be set up by cross-bill. *Epping v. Aiken*, 71 Ga. 682. It may be amended so as to make a change in the ground of the relief sought when the proofs which make it necessary are furnished by the original complainant in support of the allegations in his bill. *Chicago &c. Ry. Co. v. Third Nat. Bank*, 184 U. S. 276. If irregular as a cross-bill it may sometimes be sustained as an original bill. *Foss v. First Nat. Bank*, 1 McCrary, 474. Cf. *Draper v. Gordon*, 4 Sandf. Ch. 210. If it purports to answer the bill of only one of several complainants, he alone is bound to notice it. *Johnson v. Morrison*, 5 B. Mon. (Ky.) 106. Where the surviving complainants were insolvent the defendant who had demands against

the deceased and surviving complainants jointly was permitted to file a cross-bill in the nature of an original bill against the surviving complainants and the personal representatives of the deceased complainant, and the proceedings in the original suit were stayed until the cross-suit was in readiness for a hearing. *Brown v. Story*, 2 Paige, 594.

<sup>1</sup> Langdell's Eq. Pl., § 155.

<sup>2</sup> *Weed v. Small*, 3 Sandf. Ch. 273; *Montgomery v. Olwell*, 1 Tenn. Ch. 169; *Glenn v. Clark*, 53 Md. 580; *Beck v. Beck*, 43 N. J. Eq. 39; *Krueger v. Ferry*, 41 N. J. Eq. 432, 435; *Lantz v. Gordon*, 28 Fed. Rep. 264; *Draper v. Gordon*, 4 Sandf. Ch. 210; *Brown v. Bell*, 4 Hayw. 287; *Bullock v. Brown*, 20 Ga. 472; *Braman v. Wilkinson*, 3 Barb. 151; *Tison v. Tison*, 14 Ga. 167; *Scott v. Rowland*, 82 Va. 484; *Kilbreth v. Root*, 83 West Va. 600; s. c., 11 S. E. Rep. 21; *Chalfants v. Martin*, 25 West Va. 394, 396; *Enoch v. Petroleum Co.*, 23 West Va. 314; *Wing v. Goodman*, 75 Ill. 159. An unnecessary cross-bill, in a case where the plaintiff in the original bill was also in fault, was dismissed without costs to either party. *Bogle v. Bogle*, 3 Allen, 158.

<sup>3</sup> *Hook v. Richeson*, 115 Ill. 431.

a defendant was not allowed to file a supplemental answer for the purpose of setting up a material fact arising since the filing of the original answer. The proper course was to file a bill in the nature of a cross-bill.<sup>1</sup> Under the present practice it is said to be more customary to plead such new matter by supplemental answer.<sup>2</sup> A defendant cannot, by petition, compel a co-defendant to produce and allow him to inspect an assignment of a judgment which such co-defendant holds against him for the purpose of preparing his answer. The proper proceeding is by cross-bill.<sup>3</sup> Subsequent to the filing of a bill and answer the parties effected a settlement, and the defendant brought a petition to have the bill dismissed upon that ground. The plaintiff appeared and contested the settlement and introduced affidavits. The court having dismissed the bill, it was held too late on appeal to insist that the matter should have been presented by cross-bill instead of petition.<sup>4</sup>

§ 424. Jurisdiction of cross-bills.—It was held in England that if an original bill were filed in the court of exchequer, a cross-bill might be maintained in the court of chancery.<sup>5</sup> It is presumed that in this country a cross-bill must be filed in the court having cognizance of the original bill.<sup>6</sup> If an original

<sup>1</sup> Taylor v. Titus, 2 Edw. Ch. 185; White v. Bullock, 3 Edw. Ch. 458; Cooper's Eq. Pl., 86, 87; Hayne v. Hayne, 8 Ch. 19; Banque Franco-Egyptienne v. Brown, 24 Fed. Rep. 106, a case of a discharge in bankruptcy. See, also, Ferris v. McClure, 36 Ill. 77; Neal v. Foster, 34 Fed. Rep. 496, 498; Lambert v. Lambert, 52 Me. 544; Jenkins v. International Bank, 111 Ill. 462; Tripp v. Vincent, 3 Barb. Ch. 613. Pending a suit in equity, which had been reserved for the advice of the supreme court on a finding of the facts, the plaintiff agreed, for a valuable consideration, to withdraw the suit, but afterwards refused to do so. It was held that the proper way to obtain the benefit of the agreement was by a cross-bill or a plea *puis darrein continuance* and

not by a bill for an injunction. Kimberly v. Fox, 27 Conn. 308.

<sup>2</sup> 1 Foster's Federal Practice (2d ed.), § 171, referring to Suydam v. Truesdale, 6 McLean, 459; Kelsey v. Hobby, 16 Pet. 269, 277; Talmadge v. Pell, 9 Paige, 410, 418; Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. Rep. 602, 607. See cases cited in the preceding note. Tripp v. Vincent, 3 Barb. Ch. 613.

<sup>3</sup> Evans v. Staples, 42 N. J. Eq. 584. See, also, Kelly v. Eckford, 5 Paige, 548; Commercial Bank v. Bank, 4 Hill, 516.

<sup>4</sup> Coburn v. Cedar Valley &c. Co., 138 U. S. 196.

<sup>5</sup> Story's Equity Pleading, § 400; Parker v. Leigh, 6 Mad. 115; Giegg v. Legh, 4 Mad. 193.

<sup>6</sup> See Story's Equity Pleading (10th ed.), § 400.



bill is pending in a United States circuit court a cross-bill cannot be filed in a State court,<sup>1</sup> nor in another circuit court.<sup>2</sup> Where two suits between the same parties and relating to the same subject-matter and controversy were pending in Massachusetts, the first in Suffolk county and the second, with the parties reversed, in Norfolk county, it was doubted whether a cross-bill could be maintained in a county other than that where the original bill was pending.<sup>3</sup>

**§ 425. Equitable relief on cross-bills.**—A demurrer for want of equity will not generally hold to a cross-bill filed by the defendant solely as a defense against the complainant touching the matter of the original bill.<sup>4</sup> But where the defendant seeks affirmative relief he is limited to equitable relief.<sup>5</sup> Thus where a bill is filed by one in possession of real estate for equitable relief, a cross-bill will not lie for the purpose of obtaining possession, for that is the appropriate object of an action of ejectment.<sup>6</sup>

**§ 426. Cross-bill necessary for affirmative relief.**—It is a cardinal rule in equity pleading, subject, however, to a few exceptions noted in the following sections, that where the defendant seeks affirmative relief and relies upon the equities of his case for anything beyond defense, he must file a

<sup>1</sup> Story's Equity Pleading, § 400.

<sup>2</sup> Neal v. Foster, 84 Fed. Rep. 496.

<sup>3</sup> Tansey v. McDonnell, 142 Mass. 220, 221. See, also, Bowman v. Long, 27 Ga. 178.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1549; Story's Equity Pleading (10th ed.), § 399; Gibson's Suits in Chancery, § 664; Lantz v. Gordon, 28 Fed. Rep. 264; Alden v. Trubee, 44 Conn. 455; Lambert v. Lambert, 52 Me. 544; Cockrell v. Warren, 14 Ark. 346; Sterl v. Sterl, 2 Ill. App. 223; Nelson v. Dunn, 15 Ala. 501; Cartwright v. Clark, 4 Met. 104; Powell v. Hall, 8 De G. & S. 456; Burgess v. Wheat, 1 Eden, 190; Doble v. Potman, Har- dres, 160; Kemp v. Mackrell, 3 Atk. 812. See, also, Davis v. Cook, 65 Ala. 617.

<sup>5</sup> Lantz v. Gordon, 28 Fed. Rep. 264; Gage v. Mayer, 117 Ill. 682; Griffin v. Fries, 28 Fla. 173; Farwell v. Harding, 96 Ill. 32; Correll v. Freeman, 29 Ill. 89; Tobey v. Fore- man, 79 Ill. 489; Wright v. Frank, 61 Miss. 32; Moss v. Anglo-Egyptian Nav. Co., L. R. 1 Ch. App. 108, 112; Gilmer v. Felhour, 45 Miss. 627; Cohen v. Woollard, 2 Tenn. Ch. 686; Crisman v. Herderer, 5 Colo. 589. See, also, Young v. Colt, 2 Blatch. 373; Mills v. Mason, 120 Mass. 244.

<sup>6</sup> Calverley v. Williams, 1 Ves. Jr. 211, 213; Cross v. De Valle, 1 Wall. 5; McGuire v. Circuit Judge, 69 Mich. 593; Sprague v. Waldo, 38 Vt. 189.

cross-bill; or in some States, where the statute permits it, an answer by way of cross-bill.<sup>1</sup> Thus without the aid of a cross-bill the court is not authorized to decree against the complainant the opposite of the relief which he seeks by his bill.<sup>2</sup> Where a complainant sued for rents which the defendant had collected, and the defendant denied the complainant's right to them on the ground of a resulting trust, the defendant was held entitled to a decree establishing the trust only by filing a cross-bill.<sup>3</sup> If the defendant in a foreclosure suit desires specific

<sup>1</sup> *Fine v. King*, 88 N. J. Eq. 108; *Allen v. Roll*, 25 N. J. Eq. 164; *Andrews v. Gilman*, 122 Mass. 471; *Chapin v. Walker*, 6 Fed. Rep. 794, 795; *Armstrong v. Pierson*, 5 Iowa, 817; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302; *Harris v. Carter*, 3 Stew. (Ala.) 233; *Cummings v. Gill*, 6 Ala. 562; *Cullum v. Irwin*, 4 Ala. 452; *Schwarz v. Sears*, Walk. Ch. 170; *Cloud v. Hamilton*, 8 Yerg. 81; *Irwin v. Dyke*, 109 Ill. 528; *Ballance v. Underhill*, 8 Scam. (Ill.) 458; *Follansbee v. Scottish-Am. Mort. Co.*, 7 Ill. App. 486; *Tarleton v. Vietea*, 1 Gilm. (Ill.) 470; *Anderson v. Henderson*, 124 Ill. 164; *McConnell v. Hodson*, 2 Gilm. (Ill.) 640; *White v. White*, 108 Ill. 488; *Smith v. West*, 108 Ill. 832; *Jones v. Smith*, 14 Ill. 229; *Rowan v. Bowles*, 21 Ill. 17; *Campbell v. Benjamin*, 69 Ill. 244; *Price v. Blackmore*, 65 Ill. 888; *McConnell v. Smith*, 23 Ill. 611; *Mason v. McGirr*, 28 Ill. 822; *Hurd v. Case*, 82 Ill. 45; *Stone v. Smoot*, 89 Ill. 409; *McCagg v. Heacock*, 42 Ill. 158; *Hanna v. Ratakin*, 48 Ill. 462; *Norman v. Hudleston*, 64 Ill. 11; *Fitzhugh v. Smith*, 62 Ill. 486; *Conwell v. McCowan*, 53 Ill. 863; *Titworth v. Stout*, 49 Ill. 78; *Edwards v. Helm*, 4 Scam. 142. In regard to answers filed as cross-bills under special provision therefor, see *Bussey v. Gant*, 10 Humph. (Tenn.) 288; *Gross v. Davis*, 87 Tenn. 226; 11 S. W. Rep. 92; *Lewis v. Glass* (Tenn.), 20 S. W. Rep. 571; *Winter v.*

*McMillan*, 87 Cal. 256; s. c., 25 Pac. Rep. 407. In Tennessee such answer is treated as a cross-bill proper would be. *Nichol v. Nichol*, 4 Baxt. 145, 158. But it can be filed only against the original complainant. *Hall v. Fowlkes*, 9 Heisk. 745, 754. See further, *Van Bibber v. Hilton*, 84 Cal. 585; s. c., 24 Pac. Rep. 308; *Welles v. Rhodes*, 59 Conn. 498; s. c., 22 Atl. Rep. 286; *Leonard v. Smith*, 84 West Va. 442; s. c., 12 S. E. Rep. 479, holding that cross-bills may still be used; *Kilbreth v. Root*, 88 West Va. 600; s. c., 11 S. E. Rep. 21. Although, under section 4918, United States Revised Statutes, a defendant in a case involving interfering patents may have affirmative relief upon his answer, he may file a cross-bill for such relief if he chooses to do so. *American Clay Bird Co. v. Ligowski Clay Pigeon Co.*, 81 Fed. Rep. 466.

<sup>2</sup> *Washington &c. R. Co. v. Washington*, 10 Wall. 299. Upon a bill to set aside a conveyance the latter cannot be carried into execution without a cross-bill. *Meissner v. Buck*, 28 Fed. Rep. 161. *Gould v. Stanton*, 16 Conn. 12, holds that a decree establishing the conveyance without a cross-bill cannot be impeached collaterally. *Burch v. West*, 23 Ill. App. 859, declares that it is not affirmative relief upon a bill to impeach a judgment to decree that it is a valid lien.

<sup>3</sup> *Beck v. Beck*, 43 N. J. Eq. 40.

performance of an agreement by way of satisfaction of the mortgage debt he must file a cross-bill.<sup>1</sup> Upon a bill to reform a deed the defendant can have relief by reformation as to another and totally different mistake only upon a cross-bill.<sup>2</sup>

§ 427. **The same subject continued — Federal practice in removed cases.**— Where a suit in equity is brought in a United States court, the proceedings are governed by the federal equity rules regardless of the practice in the courts of the State wherein the federal court is held.<sup>3</sup> But where the case is one brought by removal from a State court, “the rights of the parties are exactly the same as when the case was taken from the State court, and are not to be changed except so far as is required by the fact that the equity and law jurisdictions of the federal courts are entirely distinct.”<sup>4</sup> Thus, according to a recent decision, if the State statute allows affirmative relief upon an answer claiming the benefit of a cross-bill, such an answer will not be deprived of that character after the suit has been removed to a federal court, but will be accorded all the privileges of a cross-bill.<sup>5</sup>

§ 428. **Affirmative relief by a conditional decree.**— The rule stated in the last section but one is qualified by certain cases which hold it to be a legitimate expedient under particular circumstances to afford positive relief to a defendant upon a mere answer by annexing an appropriate condition to a decree in favor of the complainant. Thus in a suit to remove a trustee and to compel him to restore the property in his custody, he filed an answer claiming a lien for a certain amount, and the court made a decree for the delivery of the property on condition that the complainant satisfy the debt, the amount of which and the existence of the lien being in direct issue on the pleadings and proof.<sup>6</sup> So where by mistake of

<sup>1</sup> *Chandler v. Herrick*, 11 N. J. Eq. 497.

<sup>2</sup> *White v. White*, 103 Ill. 438.

<sup>3</sup> § 6, *supra*.

<sup>4</sup> Per Taft, J., in *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. Rep. 569, 574. See § 354, *supra*; *Hirsh v. Jones*, 56 Fed. Rep. 187.

<sup>5</sup> *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. Rep. 569, 574, 575; § 354, *supra*. But see *Brande v. Gilchrist*, 18 Fed. Rep. 465; *McClaskey v. Barr*, 48 Fed. Rep. 180.

<sup>6</sup> *McPherson v. Cox*, 96 U. S. 404 (by a divided court).

the scrivener property was embraced in a mortgage which the parties had agreed should be excepted, it was held that in a foreclosure suit the defendant was not driven to a cross-bill praying for reformation of the mortgage, but that relief could be attained by a decree declaring that the complainant was not entitled to have the property in dispute sold to pay his debt.<sup>1</sup>

**§ 429. Account and specific performance on an answer.**—Where the complainant asks for an account a decree may be rendered in favor of the defendant for the balance due him, if any, without a cross-bill.<sup>2</sup> And upon a bill for specific performance of an agreement, where the defendant's answer supported by proof shows that the contract should be reformed on the ground of mistake, the modern practice is to decree a performance of the real agreement according to and on the answer instead of requiring a cross-bill.<sup>3</sup>

**§ 430. Decree between co-defendants without a cross-bill.** In chancery suits, where parties are often made defendants

<sup>1</sup> *Ames v. New Jersey Franklinit Co.*, 12 N. J. Eq. 66. Whether this case can stand with *Allen v. Roll*, 25 N. J. Eq. 168, is open to consideration. And where, from whatever cause, an instrument cannot support a right to recover which is based upon it, the court may without a cross-bill refuse a decree enforcing it. *Bay v. Shrader*, 50 Miss. 326. See, also, *Northern Railroad v. Ogdensburg R. Co.*, 18 Fed. Rep. 815; *Pitts v. Powledge*, 56 Ala. 147, 151, an excellent case; *Baker v. Oil Tract Co.*, 7 West Va. 454, and the cases cited in the following section.

<sup>2</sup> *Polk v. Mitchell*, 1 Pickle (Tenn.), 684; *Allen v. Allen*, 11 Heisk. 387; *Nyburg v. Pearce*, 85 Ill. 898; *Scott v. Lalor*, 18 N. J. Eq. 801; *Campbell v. Campbell*, 8 N. J. Eq. 740; *Johnson v. Buttler*, 31 N. J. Eq. 85, dismissing a cross-bill on general demurrer as improper; *Gassart v. Black*, 11 Mont. 185;

s. c., 27 Pac. Rep. 791; *Little v. Merrill*, 62 Me. 828; *Clarke v. Tipping*, 4 Beav. 588; *Jervis v. Berridge*, L. R. 8 Ch. 357; *Toulmin v. Reid*, 14 Beav. 499. See, also, *Alston v. Alston*, 34 Ala. 15; *Edgerton v. Young*, 43 Ill. 464; *Blair v. Green*, 45 N. J. Eq. 671, 676. The mortgagor, defendant in a foreclosure suit, may and ought to avail himself by answer of his right to compel the complainant, the mortgagee in possession, to account for rents and profits. *Krueger v. Ferry*, 41 N. J. Eq. 482.

<sup>3</sup> *Bradford v. Union Bank*, 13 How. 57; *Sims v. McEwen*, 27 Ala. 184; *Northern Railroad v. Ogdensburg R. Co.*, 18 Fed. Rep. 815 (see s. c., 20 Fed. Rep. 347); *Staplyton v. Scott*, 13 Ves. 425; *Fife v. Clayton*, 18 Ves. 546; *Gwyn v. Lethbridge*, 14 Ves. 585; *London &c. Ry. Co. v. Winters*, Craig & Phil. 62.

because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, although they are not put in issue by the pleadings and no adversary proceedings are had; and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree.<sup>1</sup>

**§ 431. Who may file a cross-bill.**— A cross-bill cannot be filed by one who could not have filed an original bill for the same purpose.<sup>2</sup> Thus, a sheriff, defendant in a suit, cannot file a cross-bill to aid his execution or enforce a claim.<sup>3</sup> And a cross-bill in the nature of a bill of review will be dismissed where a bill of review would have been dismissed for being filed too late.<sup>4</sup> A cross-bill cannot be maintained against a co-defendant upon a contemplated cause of action to arise if

<sup>1</sup> The text is substantially the language of Mr. Justice Miller in *Corcoran v. Chesapeake &c. Canal Co.*, 94 U. S. 741, 744, and re-affirmed in *Louis v. Brown Township*, 109 U. S. 162, 167. In *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 718, Lord Eldon said:—“Where a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants and is bound to do so.” The doctrine is clearly declared in *Elliott v. Pell*, 1 Paige, 263, 268, but with important limitations in *Walker v. Byers*, 14 Ark. 246, 261. See, also, *Henshaw v. Ward*, 9 Humph. 568; *Ingram v. Smith*, 1 Head, 428; *Mount v. Potts*, 23 N. J. Eq. 188; *Vance v. Edwards*, 11 West Va. 342; *La Grange &c. R. Co. v. Memphis &c. R. Co.*, 7 Cold. (Tenn.) 420, 452; *Allen v. Bangus*, 1 Swan, 404; *Sanford v. Morrice*, 11 Cl. & F. 667, 681; *Farquharson v. Seton*, 5 Russ. 46, 62; *Hood v. Chapman*, 19 Beav. 90; *Roby v. Ride-*

*halgh*, 7 De G. & M. 104; *Cottingham v. Earl of Shrewsbury*, 3 Hare, 638; *Bate v. Hooper*, 5 De G., M. & G. 345. See, however, *Smith v. Woolfolk*, 115 U. S. 148, where it was said that “one defendant cannot have a decree against a co-defendant without a cross-bill, with proper prayer and process or answer, as in an original bill;” and to the same effect, *Veach v. Rice*, 131 U. S. 317; *Cullum v. Erwin*, 4 Ala. 452; *Cummins v. Gill*, 6 Ala. 562; *Shelby v. Smith*, 3 A. K. Marsh. 504; *Ringo v. Woodruff*, 43 Ark. 469; *Barker v. Belknap*, 39 Vt. 168, 173; *Talbot v. M’Gee*, 4 Monr. 379; *Fletcher v. Holmes*, 25 Ind. 458. As to defenses and relief on an answer in partition suits, see *McClaskey v. Barr*, 48 Fed. Rep. 130, 134.

<sup>2</sup> *Hackley v. Mack*, 60 Mich. 591; s. c., 27 N. W. Rep. 591; *Waddell v. Beach*, 9 N. J. Eq. 793. See, also, *Young v. Colt*, 2 Blatchf. 373; *Hall v. Harrington*, 41 Mich. 146.

<sup>3</sup> *Hackley v. Mack*, 60 Mich. 591; s. c., 27 N. W. Rep. 591.

<sup>4</sup> *Pestel v. Primm*, 109 Ill. 353.

the complainant in the original bill shall obtain the relief which he seeks against such defendant.<sup>1</sup> It is a general rule that a cross-bill cannot be filed by persons not parties to the original suit,<sup>2</sup> especially on a claim which would not be maintainable by the original defendants;<sup>3</sup> and certainly not without the permission of the court.<sup>4</sup> But a purchaser *pendente lite* from a party to the suit has such a privity as to entitle him to file a bill in the nature of a cross-bill to make himself a party and have his rights protected.<sup>5</sup> Where in proceedings against a creditor to subject certain property to the payment of the claims of all, some of the creditors entered as co-defendants and filed a cross-complaint seeking the same relief as that in the original bill, a motion to erase the cross-complaint because the parties introducing it were represented by the counsel for the plaintiff was denied.<sup>6</sup> It has been held that a cross-bill filed by a third party without objection and answered by the complainant ought not to be dismissed until the final hearing.<sup>7</sup>

§ 432. Cross-bills by direction of the court.—When at the hearing of a cause it is apparent that a cross-bill is necessary to the complete determination of the controversy and the rights of all the parties, the court may direct it to be filed.<sup>8</sup> In such a case the court “will reserve the directions or declarations which it may be necessary to give or make, touching the matter not fully in litigation by the former bill,

<sup>1</sup> Brooks v. Martin, 62 Miss. 217, where a defendant in a bill to redeem from him as equitable mortgagee under an absolute deed with warranty of title was held not entitled to a cross-bill against his grantor, a co-defendant, on the ground of possible breach of the warranty in the event of complainant being permitted to redeem.

<sup>2</sup> Whitbeck v. Edgar, 2 Barb. Ch. 106.

<sup>3</sup> Curran v. St. Charles Car Co., 32 Fed. Rep. 885; Renfro v. Goetler, 78 Ala. 311; Ide v. Ball Engine Co., 31 Fed. Rep. 904.

<sup>4</sup> Bronson v. La Crosse &c. R. Co.,

2 Wall. 283, 294, 303; Putnam v. New Albany, 4 Biss. 365, 367; Forbes v. Memphis &c. R. Co., 2 Woods, 323.

<sup>5</sup> Whitbeck v. Edgar, 2 Barb. Ch. 106.

<sup>6</sup> Merwin v. Richardson, 52 Conn. 225. See, also, Lee v. Cole, 44 N. J. Eq. 318. In a suit to foreclose a chattel mortgage, one claiming to own part of the property may be permitted to intervene and file a cross-bill. Osborne v. Barge, 30 Fed. Rep. 805.

<sup>7</sup> Payne v. Cowan, 1 Sm. & M. 26.

<sup>8</sup> Gibson's Suits in Chancery, § 667; 2 Daniell's Ch. Pr. (5th ed.) 1550.

until this new bill is brought to a hearing.”<sup>1</sup> In one case, at least, a decree was reversed on account of the neglect of the court to order a cross-bill to be filed.<sup>2</sup>

**§ 433. Relation of cross and original bill as to subject-matter.**—A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court so that there may be a complete decree touching the subject-matter of the action.<sup>3</sup> Whether it is filed for the purpose of enabling a defendant to make a defense more complete and effectual than he would be permitted to make if he stood on an answer alone, or for the purpose of enabling the court to do more complete justice to all parties in respect to the matter put in litigation by the original bill, the rule is imperative that the new facts sought to be introduced by it must be so directly and closely connected with the cause of action set up in the original bill as to render the cross-suit a more auxiliary of the original suit, or a graft or dependency upon it.<sup>4</sup> A cross-bill may, however, and usually does, raise new

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1550.

<sup>2</sup> Sims v. Burk, 109 Ind. 214.

<sup>3</sup> *Ex parte* Railroad Co., 95 U. S. 221.

<sup>4</sup> Krueger v. Ferry, 41 N. J. Eq. 482, 485; s. c., 14 Atl. Rep. 811; Lautz v. Gordon, 28 Fed. Rep. 264; Kirkpatrick v. Corning, 39 N. J. Eq. 136; Johnson R. R. Signal Co. v. Union S. & S. Co., 48 Fed. Rep. 381; Galatian v. Erwin, Hopk. Ch. 48; Sebring v. Conkling, 32 N. J. Eq. 24; Argus v. Carver, 17 How. 591; Cross v. De Valle, 1 Wall. 1; Nelson v. Dunn, 15 Ala. 501; Rubber Co. v. Goodyear, 9 Wall. 807; Josey v. Rogers, 13 Ga. 478; Hornor v. Hanks, 22 Ark. 572; Beck v. Beck, 48 N. J. Eq. 39; Fletcher v. Wilson, 1 Sm. & M. 376; Follansbee v. Scottish-Am. Mort. Co., 7 Ill. App. 486, 495; Andrews v. Kibbie, 12 Mich. 96; Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361, 372; Hackley v. Mack, 60 Mich. 591; s. c., 27 N. W. Rep. 871; Pindall

v. Trevor, 30 Ark. 249; Harral v. Levarty, 50 Conn. 46 (rule applied under the Connecticut Practice Act); Griffith v. Merritt, 19 N. Y. 529; Rutland v. Paige, 24 Vt. 181. The rule is ordinarily enforced with inflexibility. Jackson v. Grant, 18 N. J. Eq. 145, 149. Claims adverse both to the mortgagor and mortgagee cannot be settled in a foreclosure suit. Farmers' L. & T. Co. v. San Diego St. Car Co., 40 Fed. Rep. 105; Dial v. Reynolds, 96 U. S. 340; McComb v. Spangler, 71 Cal. 423; s. c., 12 Pac. Rep. 347. A defendant cannot, by means of a cross-bill, litigate matters between himself and another defendant which are not the subject of the suit. Carpenter v. Gray, 37 N. J. Eq. 389; Leddell v. Starr, 19 N. J. Eq. 160; Weaver v. Alter, 3 Woods' C. C. 154. \* In Rowan v. Sharp's Rifle Manuf. Co., 33 Conn. 2, the court said:—"We know of no other case than that of set-off where matter



issues relating to the subject-matter;<sup>1</sup> it may present matters which arise between co-defendants but which are not shown by the original bill, and generally may be used to secure such moulding or modification of complainant's relief as to secure full relief to all parties.<sup>2</sup>

**§ 434. Departure from the original subject-matter.—** Upon a bill to perpetuate testimony a cross-bill cannot be filed to try the title to the subject-matter of the bill.<sup>3</sup> A defect of title to land sold is no defense to a bill to enforce the vendor's lien for unpaid purchase-money, though it is a defense to a personal decree against the vendee; hence a rescission of the contract because of the defect is matter for an original and not a cross-bill.<sup>4</sup> A prayer by cross-bill for partition in a foreclosure suit cannot be entertained.<sup>5</sup> Upon a bill

foreign or not, touching or relating to the matter charged in the original bill, has been allowed to be set up as a ground of relief in a cross-bill." In *Draper v. Gordon*, 4 Sandf. Ch. 210, the court italicised the statement that the matters upon which a cross-bill is founded must be stated in the answer to the original suit as well as in the cross-bill; citing *Irving v. De Kay*, 10 Paige, 319, 322; *Galatian v. Erwin*, Hopk. Ch. 48, 58; s. c., 8 Cowen, 361; *Field v. Schieffelin*, 7 Johns. Ch. 250; *May v. Armstrong*, 3 J. J. Marsh. (Ky.) 262.

<sup>1</sup> It is not essential that all the facts which go to show that the defendant is entitled to the relief sought should appear in the original bill. *Robins v. Swain*, 68 Ill. 197; *Jones v. Smith*, 14 Ill. 229; *Hurd v. Case*, 32 Ill. 45; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, 355.

<sup>2</sup> *Davis v. Cook*, 65 Ala. 617. See, also, *Hubbard v. Turner*, 2 McLean, 519, 539; *Coster v. Bank of Georgia*, 24 Ala. 87; *Pearson v. Darrington*, 32 Ala. 227; *Cullum v. Erwin*, 4 Ala. 452; and as to what is implied in the phrase, "subject-matter of the

suit," *Tate v. Evans*, 54 Ala. 16. "Where in a court of equity an apparent legal burden on property is challenged, the court has jurisdiction of a cross-bill to enforce by its own procedure such burden. The court which denies legal remedies may enforce equitable remedies for the same debt; and an application for the latter is not foreign to a bill for the former." *Chicago & C. Ry. Co. v. Chicago Bank*, 184 U. S. 276, 288.

<sup>3</sup> *May v. Armstrong*, 3 J. J. Marsh. (Ky.) 260.

<sup>4</sup> *Cohen v. Woollard*, 2 Tenn. Ch. 686. *Hurley v. Doleman*, 8 Head, 266, intimates that a cross-bill might be proper if a personal decree were sought in such a case.

<sup>5</sup> *Matthews v. Lindsay*, 20 Fla. 962, citing *Buckmaster v. Kelly*, 15 Fla. 180; *Mattair v. Payne*, 15 Fla. 682. In a foreclosure suit the mortgagee's title cannot be questioned. The court will not inquire what interest he has in the premises. *Chapin v. Walker*, 6 Fed. Rep. 794, 796; *Bull v. Meloney*, 27 Conn. 560; *Palmer v. Mead*, 7 Conn. 149; *Hill v. Meeker*, 23 Conn. 592; *Williams v. Robinson*, 16 Conn.

against an assignee, under an assignment for the benefit of creditors, to establish a debt due to the complainant, a cross-bill which seeks to charge the complainant as a partner of the assignee is not germane to the original bill.<sup>1</sup> Where a foreign government brought a bill for foreclosure in a Connecticut court, it was held that the respondent could not maintain a cross-bill for the payment of an independent claim against the complainant although he was without other remedy in a domestic tribunal, but that such a claim might be applied upon the mortgage debt.<sup>2</sup> Where complainant sought to establish

517; *Dial v. Reynolds*, 96 U. S. 840. See, also, § 433, n. 4, *supra*. A petition by bondholders seeking to recover damages from their trustee for maladministration of the trust cannot be filed as a cross-bill in a proceeding for the foreclosure of the deed of trust. *Fidelity T. & S. V. Co. v. Mobile St. Ry. Co.*, 58 Fed. Rep. 850. A foreclosure bill on a first mortgage prayed a decree for deficiency against the owner of the premises, who had assumed its payment, and also the payment of a second mortgage thereon. It was held that the holder of the second mortgage, who was a party, could not, by filing a cross-bill against the owner, obtain a decree for a deficiency on his own mortgage. *Sebring v. Conkling*, 82 N. J. Eq. 24.

<sup>1</sup> *Lund v. Skanes Enskilda Bank*, 96 Ill. 181.

<sup>2</sup> *Rowan v. Sharp's Rifle Mfg. Co.*, 88 Conn. 81. See, also, on the main point, *Stonemetz P. M. Co. v. Brown F. M. Co.*, 46 Fed. Rep. 851, holding, also, that in a suit for relief on account of interference and infringement, a cross-bill seeking relief for an alleged infringement of defendant's patent by complainant cannot be maintained. In *Rubber Co. v. Goodyear*, 9 Wall. 807, the bill was filed for infringement of a patent. The defenses were invalidity of the patent and a license. By the cross

bill the defendant sought to have a judgment against the plaintiff set off against the damages he might recover. The court held the cross-bill improperly filed. In *Johnson R. S. Co. v. Union S. & S. Co.*, 48 Fed. Rep. 831, permission was refused to file a cross-bill in an infringement suit wherein the defendant set up the claim of right to a trade-mark or name for an electrical system which included the use of the patentee's name, as going beyond the case of the plaintiff in the original bill, and foreign to the primary controversy. In *Datz v. Phillips*, 24 W. N. C. 382, a bill was filed for the specific performance of one agreement, and a cross-bill alleged failure of another independent agreement and prayed relief against the complainants. The court held that the cross-bill could not be sustained. In *Galatian v. Erwin*, Hopk. Ch. 48, the original suit was for foreclosing two mortgages. By cross-bill one of the defendants in her defense sought to impeach for fraud the title of the mortgagor not only to the mortgaged premises but to other land. It was held that as a defense to the original suit the cross-bill was entirely proper, but that it could not introduce a distinct suit relating to the other lands or become the foundation of a decree concerning matters not embraced in the original suit.

an equitable title against many independent claimants of parts of a tract of public land, a cross-bill by one defendant seeking a decree establishing his title as paramount to that of certain co-defendants was not proper.<sup>1</sup>

**§ 435. When germane to the original subject-matter.—** A cross-bill may be maintained for the purpose of obtaining an equitable set-off,<sup>2</sup> or to establish an agreement or conveyance which the original bill seeks to set aside,<sup>3</sup> or to compel the surrender or cancellation of a contract which the original bill seeks to specifically enforce.<sup>4</sup> Where the original bill seeks an enforcement of a judgment as a lien upon land alleged to have been fraudulently conveyed by the debtor, a cross-bill is germane which seeks to set aside the judgment for want of jurisdiction.<sup>5</sup> Upon a bill for partition, after a decree establishing against an infant owner a resulting trust as to a part of the land, a cross-bill to impeach and set aside the decree on the ground of error has sufficient connection with the subject-matter.<sup>6</sup> On a bill against the parties foreclosing a mortgage and a purchaser at the sale to compel the transfer of the certificate of purchase to the complainants, the heirs of the mortgagor, on the ground that the payee of the notes was insane when he assigned the same, a cross-bill by the purchaser against the complainants seeking to have a deed made to him on the same certificate was sustained.<sup>7</sup> Where a bill is filed to restrain an execution sale under a judgment, the defendant may file a cross-bill to have the judgment decreed a valid equitable lien on the complainant's property, and to have the property sold to satisfy it.<sup>8</sup> The plaintiff by his bill claimed to own certain real estate by in-

<sup>1</sup> *Ayres v. Carver*, 17 How. 591. Where a bill seeks to set aside a tax deed as a cloud on plaintiff's title, defendant cannot, by cross bill, set up another legal title which plaintiff has not sought to avoid. *Gage v. Mayer*, 117 Ill. 632.

<sup>2</sup> *Cartwright v. Clark*, 4 Met. 104; *Derby v. Gage*, 88 Ill. 27.

<sup>3</sup> *Carnochan v. Christie*, 11 Wheat. 446.

<sup>4</sup> *Cross v. De Valle*, 1 Wall. 5.

<sup>5</sup> *Follansbee v. Scottish-American Mort. Co.*, 7 Ill. App. 486.

<sup>6</sup> *Lloyd v. Kirkwood*, 112 Ill. 329.

<sup>7</sup> *Davis v. Amer. &c. Union*, 100 Ill. 813.

<sup>8</sup> *Chicago &c. Ry. Co. v. Third Nat. Bank*, 184 U. S. 276; s. c., 10 S. Ct. Rep. 550.

heritance from his father, to whom the defendants had conveyed it by deed absolute in form, and prayed for a decree foreclosing and establishing his title. The defendant by cross-bill alleged that the deed was made and accepted for the purpose of placing the title in trust for the benefit of one of the defendants, and asked a decree to that effect. It was held that the cross-bill was germane to the original bill.<sup>1</sup>

§ 436. **Parties to cross-bills.**—The complainant in the original suit should be made a defendant to the cross-bill in all cases.<sup>2</sup> It was held in Mississippi that a person who is not a party to the suit cannot be brought into the litigation by means of a cross-bill.<sup>3</sup> The contrary doctrine was declared in Illinois,<sup>4</sup> Colorado<sup>5</sup> and West Virginia,<sup>6</sup> and also obtains in Tennessee.<sup>7</sup> Judge Wheeler, in a case in the United States circuit court, upon a review of the authorities,<sup>8</sup> says that “the result

<sup>1</sup> *Kingsbury v Buckner*, 184 U. S. 650, 677; s. c., 10 S. Ct. Rep. 638. For other cases illustrating the propriety of cross-bills in this behalf, see *Atlanta Mills v. Mason*, 120 Mass. 244; *Hurd v. Case*, 82 Ill. 45; *Remer v. McKay*, 88 Fed. Rep. 164; *Boston &c. R. Co. v. Coffin*, 50 Conn. 151.

<sup>2</sup> *Gibson's Suits in Chancery*, § 662, citing 2 *Daniell's Ch. Pr.* (5th ed.) 1548, 1549, notes; *Hergel v. Laitenberger*, 2 Tenn. Ch. 251; *Putnam v. New Albany*, 4 Biss. 865, 878; *Weaver v. Alter*, 3 Woods' C. C. 152, 154.

<sup>3</sup> *Wright v. Frank*, 61 Miss. 32. See, also, *Shaw v. Millsaps*, 50 Miss. 380; *Larder v. Ogden*, 31 Miss. 382.

<sup>4</sup> *Hurd v. Case*, 82 Ill. 45; *Jones v. Smith*, 14 Ill. 229. But the new party must have an interest in the matter of the bill. *Kennedy v. Kennedy*, 66 Ill. 190.

<sup>5</sup> *Allen v. Tritch*, 5 Colo. 222, 228.

<sup>6</sup> *Kanawha Lodge v. Swann* (West Va.), 16 S. E. Rep. 462, where the court said:—“The later cases draw a very just and proper distinction between a cross-bill merely defensive in its character and one which seeks

affirmative relief. In the former no new parties can be introduced; in the latter they may if the ends of justice so require. It seems to be settled, notwithstanding the *dictum* of Judge Curtis in *Shields v. Barrow*, 17 How. 130, that new parties may be added by a cross-bill which is filed for affirmative relief.” See, also, *Briscoe v. Ashby*, 24 Gratt. 454.

<sup>7</sup> *Gibson's Suits in Chancery*, § 662. See, also, the *dictum* of McFarland, J., in *Hildebrand v. Beasley*, 7 Heisk. (Tenn.) 121, 128; *Cobb v. Baxter*, 1 Tenn. Ch. 405, 410, n.; *Adam v. Owen*, 2 Baxt. 446; *Masson v. Anderson*, 8 Baxt. 290; *Hall v. Fowlkes*, 9 Heisk. 745; *Macey v. Childress*, 2 Tenn. Ch. 441.

<sup>8</sup> *Brandon Mfg. Co. v. Prime*, 14 Blatchf. 871. The following is an extract from the opinion:—“If there were no authorities and there was no practice on the subject on principle, that would seem to be the proper course. That the practice in this State [Vermont], which professes to follow the English chancery practice, the same that is followed in this

of what is thought to be the soundest reasoning and the best-considered authorities is that where a cross-bill shows that there is a party to the subjects of the litigation as presented by it who has not been before made a party, nor appeared to be a necessary one, and then does appear to be such, that party should be brought in by the cross-bill.”<sup>1</sup>

§ 437. Leave to file a cross-bill.—It was expressly decided by the Supreme Court of Illinois that the filing of a cross-

court, would warrant making him a party is well known and appears in the State reports. *Blodgett v. Hobart*, 18 Vt. 414. It does not appear expressly from such English reports or text-books as have been examined what the actual practice in such cases there has been. In this country, in *Curd v. Lewis*, 1 Dana, 851, a decree was reversed for the reason that an assignor of the subject of litigation in an original and cross-bill was not a party to either, and should have been made a party to the cross-bill, and that he might be made such a party. *Wickliffe v. Clay*, 1 Dana, 585, was heard by consent only without making a party that by the cross-bill appeared necessary a new party by the cross-bill. In *Sharp v. Pitie*, 5 B. Mon. 155, a new party was added by the cross-bill against his own objection. In *Walker v. Brungard*, 13 S. & M. 728, new parties were added and new matters brought in by cross-bill and heard without objection. In disposing of this case, the chancellor, delivering the opinion of the court, said that, if that had been objected to, the new matters would all have been kept out, without saying that the new parties would have been. In *Costers v. Bank of Georgia*, 24 Ala. 87, it was expressly held that new parties should be added by cross-bill when so interested in the litigation involved by it

as to be proper parties to it. Opposed to all this is the remark of Mr. Justice Curtis in *Shields v. Barrow*, 17 How. 180, and the reasons given by him in support of it, to the effect that new parties cannot in any case properly be added by cross-bill without citing any authority for it, and books and cases that have followed that remark without citing any authority. The precise question was not involved in that case, but the mere *dictum* of such a judge of such a court would ordinarily be followed, especially by lower courts. An examination of his reasoning shows that he made the suggestion without such examination, probably, and his reasoning does not cover the whole ground as to all classes of cases. The modes of procedure he suggests would probably be ample in all cases of cross-bills brought for discovery in aid of a defense merely to the original bill, but not in cases of those brought for relief as well as defense where new parties would be necessary to the relief sought. Weighty as that remark is, it is not thought to be sufficient to control the reasons and authorities to the contrary.”

<sup>1</sup> *Brandon Mfg. Co. v. Prime*, 14 Blatchf. 871. See, also, under the English Judicature Act, *Dear v. Swarder*, 4 Ch. Div. 476; *Buck v. Evans*, 4 Ch. Div. 482.

bill in a proper case is a matter that requires no leave.<sup>1</sup> The same ruling was made by Judge Deady of the United States circuit court.<sup>2</sup> It was subsequently declared by the United States Supreme Court that it is within the discretion of the court to grant or to refuse leave and that a refusal is no ground of appeal.<sup>3</sup>

**§ 438. Time for filing a cross-bill.**— A cross-bill should regularly be filed at the same time with the answer to the original bill<sup>4</sup> and not before,<sup>5</sup> but may be filed at any time

<sup>1</sup> *Beauchamp v. Putnam*, 84 Ill. 878, 881, reversing a decree for error in refusing leave; *Quick v. Lemon*, 105 Ill. 578, 585. See, also, *Jones v. Smith*, 14 Ill. 229. It may be filed at any time before the hearing, and a change of venue previous to filing is not material. But it must not delay the hearing. *Davis v. American Foreign Christian Union*, 100 Ill. 818.

<sup>2</sup> *Neal v. Foster*, 84 Fed. Rep. 496. "The only case I have found on this subject," said he, "is *Bronson v. Railroad Co.*, 2 Wall. 288. There a cross-bill filed without leave of the court was set aside as irregular. But it was filed by a person not a party to the suit, who petitioned the court for leave to answer for a defendant corporation then in default, of which he was a stockholder, and also to file a cross-bill. Leave was given to file the answer, but as to the cross-bill the order of the court was silent. The party filed the answer for the corporation and also a cross-bill, which was subsequently set aside because filed without leave by a stranger to the suit." But a cross-bill filed contrary to the practice of the court is open to demurrer. S. C., p. 497.

<sup>3</sup> *Indiana &c. R. Co. v. Liverpool &c. Ins. Co.* (1888), 109 U. S. 168. See, also, *Mercantile Trust Co. v. Missouri &c. Ry. Co.*, 41 Fed. Rep. 8; *Brush*

*Electric Co. v. Brush-Swan Electric L. Co.*, 48 Fed. Rep. 701; *International Tooth Crown Co. v. Carmichael*, 44 Fed. Rep. 350; *Brown v. Bell*, 4 Hayw. 287.

<sup>4</sup> *Irving v. De Kay*, 10 Paige, 819; *Wiley v. Platter*, 17 Ill. 588; *Gibson's Suits in Chancery*, § 667; *White v. Buloid*, 2 Paige, 164. Tennessee Code, section 4408, requiring an answer to the original before an answer to a cross-bill, does not prevent the filing of a cross-bill before answer to the original. *Morrow v. Morrow*, 2 Tenn. Ch. 549. See, also, *Cobb v. Baxter*, 1 Tenn. Ch. 405. The rule does not apply to a cross-bill by one defendant against another. *Vanderveer's Adm'r v. Holcomb*, 21 N. J. Eq. 105. *Neal v. Foster*, 84 Fed. Rep. 496, holds that the question of the right to file a cross-bill at a particular stage of the case may be made and determined on demurrer. Where a cross-bill was filed by two of the defendants who had put in their answers disclaiming any interest in the original suit, and the cross-bill alleged that the answers were filed through mistake, etc., the pleadings were held to be incongruous and irregular, the proper course being to apply for leave to withdraw their answers. *Williams v. Carle*, 10 N. J. Eq. 544.

<sup>5</sup> *Allen v. Allen*, Hempst. 58.



before the hearing, provided the latter be not thereby delayed,<sup>1</sup> or, in the discretion of the court, and to effectuate the ends of justice, even at the hearing;<sup>2</sup> or after decree if the court still has control of the case,<sup>3</sup> unless the defendant proposes to take additional testimony.<sup>4</sup>

§ 439. **The same subject continued.**— It is generally stated in the books that a cross-bill must be filed before publication; that is, before the taking of the testimony in the original case is completed and the same opened to the inspection of the parties,<sup>5</sup> unless the complainant in the cross-bill is willing to go to a hearing on the bill and answer as to the cross-suit;<sup>6</sup> and that unless directed by the court it cannot be filed after a hearing on the original bill.<sup>7</sup> But a cross-bill may be filed after answer, where the complainant is seeking to discontinue, and the object of the cross-bill is to enable the defendants to take an aggressive attitude and settle finally the rights in litigation;<sup>8</sup> and the court will give a defendant leave to file a

<sup>1</sup> *Davis v. American & Foreign Christian Union*, 100 Ill. 313; *Young v. Pott*, 4 Wash. 521, where under special circumstances the proceedings were stayed.

<sup>2</sup> *Morgan's Co. v. Texas Central R. Co.*, 187 U. S. 172, 201; *Field v. Schieffelin*, 7 Johns. Ch. 260. See, also, *Cartwright v. Clark*, 4 Met. 104.

<sup>3</sup> *Chicago Artesian Well Co. v. Conn. Mut. L. Ins. Co.*, 57 Ill. 424; *Kirtland v. M. & T. R. Co.*, 4 Lea (Tenn.), 414. See, also, *La Touche v. Lord Dunsany*, 1 Sch. & Lef. 187; and *cf. Metcalf v. Hart* (Wyo.), 27 Pac. Rep. 900.

<sup>4</sup> *Rogers v. Reissner*, 31 Fed. Rep. 591.

<sup>5</sup> *Field v. Schieffelin*, 7 Johns. Ch. 250, a contrary rule opening the door to perjury and fraud; *Sterry v. Arden*, 1 Johns. Ch. 62; *Gouverneur v. Elmendorf*, 4 Johns. Ch. 357, 359; *Bronson v. La Crosse & C. Ry. Co.*, 2 Black, 528. In Georgia before the pleadings are made up, unless suffi-

cient cause be shown to the contrary. *Josey v. Rogers*, 13 Ga. 478. In view of the modern practice of taking testimony orally in the presence of parties and counsel, Judge Deady, in *Neal v. Foster*, 34 Fed. Rep. 496, 499, concludes that "there can be no fixed rule against a defendant's filing a cross-bill, in a proper case, before the final hearing; the objection being disposed of in each case on the particular circumstances thereof or by rule of court or the Supreme Court;" and that even under the old practice the objection, or at least the reason of it, was confined to cases where it was sought to introduce further testimony concerning the matters already in issue.

<sup>6</sup> *White v. Buloid*, 2 Paige, 164.

<sup>7</sup> *Roberts v. Peavey*, 29 N. H. (9 Foster), 392; *Montgomery v. Olwell*, 1 Tenn. Ch. 169, 172; *Brown v. Bell*, 4 Hayw. 287.

<sup>8</sup> *Pullman's Palace Car Co. v. Central Transp. Co.*, 49 Fed. Rep. 261.



cross-bill against a co-defendant after return of the master's report if it be necessary to his protection.<sup>1</sup>

**§ 440. Evidence on bill and cross-bill.**— Either party may obtain an order, on motion of course, for liberty to read at the hearing the evidence taken by his adversary, saving all just exceptions.<sup>2</sup> If a cross-bill is taken as confessed, it may be used as evidence against the complainant in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer.<sup>3</sup> “Upon bill and cross-bill, where there are the same parties and the evidence is applicable to the issues in both suits, in a hearing upon the cross-bill the testimony taken in the original suit will be admitted. The court, however, will not permit testimony taken in the original suit, not relevant to the issue in that suit, to be read, although it is relevant to the issue made by the pleadings to the suit on the cross-bill.”<sup>4</sup>

**§ 441. Staying proceedings on the original bill.**— The filing of a cross-bill does not, as a matter of course, stay the proceedings in the original suit.<sup>5</sup> In no case is the complainant in the original suit compelled to stay proceedings therein, upon the filing of the cross-bill, except by a special order of

<sup>1</sup> Huber v. Diebold, 25 N. J. Eq. 170. See, also, Berryman v. Graham, 21 N. J. Eq. 870.

<sup>2</sup> Lubiere v. Genow, 2 Ves. Sr. 579; Christian v. Wrenn, Bunb. 381. See Moore v. Harper, 1 W. N. 56; s. c., 14 W. R. 306; 2 Fowler's Ex. Pr. 166, and Wilford v. Beasely, 3 Atk. 501. United States Rule in Equity 72 provides that “where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and

used by the party filing the cross-bill at the hearing in the same manner and under the same restrictions as the answer praying relief may now be read and used.” See Gray v. Haig, 18 Beav. 65; Hannah v. Hodgson, 3 Beav. 19.

<sup>3</sup> White v. Buloid, 2 Paige, 164.

<sup>4</sup> Holcombe v. Holcombe's Ex'rs, 10 N. J. Eq. 284, 285; Underhill v. Van Cortlandt, 2 Johns. Ch. 355. Evidence in support of a cross-bill is irrelevant where there has been no reply to a plea thereto. Knowlton v. Hanbury, 117 Ill. 471.

<sup>5</sup> Williams v. Carle, 10 N. J. Eq. 543.

the court,<sup>1</sup> founded upon application,<sup>2</sup> and notice to the adverse party.<sup>3</sup>

**§ 442. The same subject continued.**— The ordinary course of the court is not to stop the progress of the cause unless the cross-bill is filed in due time.<sup>4</sup> If the cross-bill is not filed before or at the time of answering in the original suit, the delay must be accounted for or the proceedings will not be stayed.<sup>5</sup> Where a cross-bill was not filed until a year after the filing of the original bill, and after the proofs had been taken and the original cause noticed for hearing, and a proper decree could be made without the necessity of a cross-bill, the chancellor would not delay the hearing on the original bill on the ground that the plaintiffs had not answered the cross-bill.<sup>6</sup>

<sup>1</sup> *White v. Buloid*, 2 Paige, 164; *Gouverneur v. Elmendorf*, 4 Johns. Ch. 357; *Clark v. Carlton*, 4 Lea, 452; *Brown v. Bell*, 4 Hayw. 287; *Noel v. King*, 2 Mad. 394.

<sup>2</sup> *Beauchamp v. Putnam*, 84 Ill. 378, 381. All the complainants in a cross-bill must join in the application to stay the proceedings in the original suit until the complainants therein have answered the cross-bill. And to entitle the complainants in the cross-bill to such an order the matters stated in the cross-bill must be sworn to by some person who knows the facts. *Talmadge v. Pell*, 9 Paige, 410. See, also, *Van Valtenburg v. Alberry*, 10 Iowa, 264.

<sup>3</sup> *Cartwright v. Clark*, 4 Met. 104; *Aylet v. Easy*, 2 Ves. Sr. 336; *Williams v. Carle*, 10 N. J. Eq. 543. In the leading case of *White v. Buloid*, 2 Paige, 164, it was said that if the complainant in the cross-bill wishes to stay proceedings in the original suit, the cross-bill should be filed on oath, and a certificate of counsel should be obtained stating that he believes a stay of proceedings in the original suit to be necessary for the attainment of justice in the cause, and that the cross-bill is not intended

for delay. As to the effect upon the priority of the original bill by the complainant's amending it, see *Steward v. Roe*, 2 P. Wms. 435; *Long v. Burton*, 2 Atk. 218; *Rattray v. Darley*, 3 Atk. 724; *Johnson v. Freer*, 2 Cox's Cas. 371; *Hoffman's Ch. Pr.* (2d ed.), 350, 351; *Noel v. King*, 2 Mad. 392; *Gray v. Haig*, 18 Beav. 65.

<sup>4</sup> *Coates v. Pearson*, 4 Madd. 262; *Eddleston v. Collins*, 1 De G., M. & G. 1, 16. Unless the defendant in the cross-bill is in contempt for not answering. *White v. Buloid*, 2 Paige, 164; *Creswick v. Creswick*, 1 Atk. 291.

<sup>5</sup> *White v. Buloid*, 2 Paige, 164; *Irving v. De Kay*, 10 Paige, 319.

<sup>6</sup> *Williams v. Carle*, 10 N. J. Eq. 544. The court may, upon the hearing, postpone a final determination if it shall appear to be indispensable. *Brown v. Bell*, 4 Hayw. 287. See, also, *Coleman v. Moore*, 3 Litt. (Ky.) 355. Where the prayer of a cross-bill is for discovery of matter going to show that the court has not jurisdiction of the principal cause, the latter should not be heard until the answer is filed to the cross-bill. *Young v. Pott*, 4 Wash. 521. The cross-cause may be heard first to settle a pre-

§ 443. **Frame of a cross-bill.**—The only difference between a bill and a cross-bill is that the former is filed by the complainant and the latter by a defendant. Both contain a statement of the facts and each may demand affirmative relief upon the facts stated.<sup>1</sup> A bill which does not pray that the cause may be heard at the same time with the original and one decree be had in both lacks one of the prominent features of a cross-bill.<sup>2</sup> Where a defendant in his answer denying the allegations of the bill sets forth a complaint against the complainant and calls for an answer and prays for a decree, the answer is for all substantial purposes entitled to be treated as a cross-bill.<sup>3</sup> It is not necessary that the cross-bill should be on a separate paper; the defendant's answer being complete he may state new matter making a title to affirmative relief and pray in conclusion for the relief sought.<sup>4</sup> But if so drawn it must be sufficient to constitute a cross-bill had it been disconnected and a proper heading attached.<sup>5</sup> A cross-bill must contain in itself all the facts requisite to entitle the pleader to relief, and not rely upon the original bill for a statement of the cause of action.<sup>6</sup> And where, as in Michigan, by statute or rule of court, a defendant may have affirmative relief upon his answer, there must be the same particularity and certainty in the allegations as

liminary question. *Randolph's Appeal*, 66 Pa. St. 178. The formal dismissal of a cross-bill is not necessary where its subject-matter is disposed of by the decree on the original bill. *Ross v. Clare*, 8 Dana, 189. A decree on the cross-bill must yield to a later decree on the original if they are repugnant. *Ex parte Railroad Co.*, 95 U. S. 221, 225.

<sup>1</sup> *Ewing v. Patterson*, 85 Ind. 326; *Masters v. Beckett*, 83 Ind. 593, 596.

<sup>2</sup> *Kirkman v. Vanlier*, 7 Ala. 217; *McDougald v. Dougherty*, 14 Ga. 674. But it would seem if they are calculated to present one and the same point, although for different objects, they may be prosecuted at the same time. *Wright v. Taylor*, 1 Edw. Ch. 226.

<sup>3</sup> *Allen v. Allen*, 14 Ala. 666.

<sup>4</sup> *Thielman v. Carr*, 75 Ill. 385. See, also, *Talbot v. McGee*, 4 Monr. (Ky.) 875, 879. *Contra*, *Hubbard v. Turner*, 2 McLean, 519, 540; *Morgan v. Tipton*, 8 McLean, 359, 344.

<sup>5</sup> *Purdy v. Henslee*, 97 Ill. 389.

<sup>6</sup> *Campbell v. Routt*, 42 Ind. 410; *Coulthurst v. Coulthurst*, 58 Cal. 239; *Washington R. Co. v. Bradleys*, 10 Wall. 299, 300, 303, where the pleading was grossly defective. In *Akin v. Cassiday*, 105 Ill. 22, a cross-bill was dismissed on motion because it contained only matter already properly set up in the bill. The converse of the proposition stated in the text is also true. *Mercier v. Lewis*, 39 Cal. 532.

would be necessary in a regular cross-bill.<sup>1</sup> And a rule requiring a bill to be verified applies to such a cross-bill.<sup>2</sup> An answer cannot be deemed a cross-bill merely because it contains a request that it be so taken.<sup>3</sup> But if it is entitled a cross-bill it is not to be disregarded because the statute denominates it a cross-petition.<sup>4</sup> The complainant in the cross-bill cannot be allowed to contradict his answer in the original suit.<sup>5</sup> It is a well-settled rule that when the defendant has mistaken the facts in his original answer he cannot contravene his admissions otherwise than by moving to correct it either by amendment or supplemental answer.<sup>6</sup> Nor can he affirm by his cross-bill what he denies in his answer.<sup>7</sup> If the interests and defenses of all the defendants are the same against the complainant they should unite in the cross-bill and not file separate pleadings.<sup>8</sup>

§ 444. The same subject continued.—A cross-bill should state the parties, prayer and objects of the original bill, the proceedings thereon and the rights of the complainant therein which are sought to be made the subject of the cross-litigation.<sup>9</sup> “In England, where this rule had its origin, a cross-bill might have been filed in another court than that in which the

<sup>1</sup>McGuire v. Circuit Judge, 69 Mich. 593. As to subsequent pleadings, see Hackley v. Mack, 60 Mich. 591. But a description of real estate in a cross-complaint in an action to quiet title, omitting the county and State but designating it as “the real estate in the complaint mentioned,” is sufficient. Cookerly v. Duncan, 87 Ind. 332. Where, in a suit to foreclose a mortgage, a defendant files a cross-bill setting up another mortgage, but not averring its date, or that it is a prior lien, and offers no proof in reference to it, a decree disregarding the cross-bill and its prayer is not erroneous. Johnson v. Meyer (Ark.), 16 S. W. Rep. 121.

<sup>2</sup>Bernier v. Bernier, 72 Mich. 43; s. c., 40 N. W. Rep. 50.

<sup>3</sup>Ballance v. Underhill, 3 Scam.

(Ill.) 453; Purdy v. Henslee, 97 Ill. 389; Parke v. Brown, 12 Ill. App. 291.

<sup>4</sup>Russell v. Lamb, 82 Iowa, 558; s. c., 48 N. W. Rep. 339.

<sup>5</sup>Savage v. Carter, 9 Dana, 414; Hudson v. Hudson, 3 Rand. (Va.) 117; Jackson v. Grant, 18 N. J. Eq. 145, 149. See Dill v. Shahan, 25 Ala. 694.

<sup>6</sup>Graham v. Tankersley, 15 Ala. 634.

<sup>7</sup>Graham v. Tankersley, 15 Ala. 634.

<sup>8</sup>Scott v. Allgood, 1 Fowler's Ex. Pr. 91, where defendant obtained an order to answer only one, and that all be consolidated.

<sup>9</sup>Story's Equity Pleading (10th ed.), § 401; Neal v. Foster, 34 Fed. Rep. 496, 497. See, also, Tansey v. McDonnell, 142 Mass. 220.

original was pending.<sup>1</sup> In such case it would be necessary to set forth the matters in the original bill and its prayer and object together with the proceedings thereon, if any, so that the court might be possessed of the whole case of which the cross-bill is only a part. But this practice never obtained in this country. In the national courts, at least, the cross-bill must from the necessity of the case be filed in the circuit court where the original bill is pending. Hence there is no necessity for bringing the facts of the original bill or its object or prayer to the attention or knowledge of the court by repeating them in the cross-bill, and a mere reference to the bill which is already before the court, and the object of the case, is sufficient for all practical purposes. Of course it is necessary to set forth in the cross-bill so much of the matter in the original bill and the subsequent pleadings and proceedings thereon as may be essential to show what right or defense is sought to be brought before the court for adjudication and to make a proper case therefor.”<sup>2</sup> The cross-bill should be signed by counsel,<sup>3</sup> and pray for a subpoena, to the end that the premises may be answered.<sup>4</sup>

**§ 445. Process upon cross-bills.**—The appearance of a defendant to a cross-bill is enforced in the same manner as the appearance of a defendant to an original bill;<sup>5</sup> and it may be regarded as abandoned if the parties voluntarily go to a hearing without an answer.<sup>6</sup> It is the duty of a party who files a cross-bill to take steps to have it answered.<sup>7</sup> In a proper case

<sup>1</sup> Story's Equity Pleading, §§ 400, 424, *supra*.

<sup>2</sup> Per Deady, J., in *Neal v. Foster*, 84 Fed. Rep. 496, 497. By statute in Illinois the defendant is expressly excused from stating in his “cross-bill any of the pleadings or proceedings in the suit” in which it is to be filed. *Cable v. Ellis*, 120 Ill. 136, 142.

<sup>3</sup> Smith's Ch. Pr., Book II, c. i.

<sup>4</sup> 2 Barbour's Ch. Pr. (2d ed.) 132; *Hayne v. Hayne*, 8 Ch. Rep. 19; *Talmadge v. Pell*, 9 Paige, 410.

<sup>5</sup> *Thomason v. Neeley*, 50 Miss. 310; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.)

457; *Washington & Co. R. Co. v. Washington*, 10 Wall. 299; *Ballance v. Underhill*, 8 Scam. (Ill.) 453, 461; *Cummings v. Gill*, 6 Ala. 452, *Shelby v. Smith*, 2 A. K. Marsh. 504; *Smith v. Woolfolk*, 115 U. S. 143. See *Anderson v. Ward*, 8 B. Mon. (Ky.) 47.

<sup>6</sup> *Hungate v. Reynolds*, 72 Ill. 425; *Purdy v. Henslee*, 97 Ill. 389; *Parke v. Brown*, 12 Ill. App. 291; *Thomason v. Neeley*, 50 Miss. 310.

<sup>7</sup> *Reed v. Kemp*, 16 Ill. 445; *Purdy v. Henslee*, 97 Ill. 389. In Arkansas process is necessary as against a co-defendant, but not as against the

an order may be obtained for substituted service of a subpoena to answer a cross-bill upon the solicitor in the original bill.<sup>1</sup>

**§ 446. Original and cross-bill as one cause.**—For many purposes the original and cross-bill are considered as one cause.<sup>2</sup> They are ordinarily heard together, and the rights of all the parties in respect of the matters litigated are settled by one decree.<sup>3</sup> If the cross-bill be set for hearing, the legal effect is to set the original cause for hearing also;<sup>4</sup> and an appeal from a decree upon a cross-bill opens the cause on the original bill.<sup>5</sup> If there is a defect of jurisdiction under the original bill, as, for instance, where there is an adequate remedy at law, a cross-bill founded upon matters of equitable cognizance cures the defect.<sup>6</sup>

complainant in the original bill. *Hornor v. Hanks*, 22 Ark. 572; *Walker v. Byers*, 14 Ark. 262. See, also, *Josey v. Rogers*, 18 Ga. 478. No process is required to bring in as defendant to a cross-bill an infant complainant in the original bill under the Illinois statutes relating to cross-bills (1 Starr & C. Ann. St., pp. 407, 408, §§ 80-85). *Kingsbury v. Buckner*, 184 U. S. 650; s. c., 10 S. Ct. Rep. 638.

<sup>1</sup> See § 178, *supra*; *Johnson R. Co. v. Union S. & S. Co.*, 43 Fed. Rep. 831; *Dunlevy v. Dunlevy*, 88 Fed. Rep. 459; *Heath v. Erie Ry. Co.*, 9 Blatchf. 816. Cf. *Anderson v. Lewis*, 8 Bro. C. C. 429; *Bond v. Newcastle*, 3 Bro. C. C. (Bett's ed.), 387, n. 2; *Mason v. Gardiner*, 4 Bro. C. C. 478; *Bruncher v. Nichols*, 1 Howard's Eq. Side, 298; *Hoffman's Ch. Pr.* (2d ed.) 855. Service by publication is irregular. *Webster Loom Co. v. Short*, 10 Off. Gaz. 1019.

<sup>2</sup> *Neal v. Foster*, 84 Fed. Rep. 496, 498; *Gibson's Suits in Chancery*, § 668; *Cockrell v. Warner*, 14 Ark. 845; *Ewing v. Patterson*, 35 Ind. 326; *Field v. Schieffelin*, 7 Johns. Ch. 252; *Cross v. De Valle*, 1 Wall. 14.

<sup>3</sup> *Whyte v. Arthur*, 17 N. J. Eq. 521; *Ballance v. Underhill*, 8 Scam. (Ill.) 453, 461; *Ayres v. Carver*, 17 How. 591; *Beauchamp v. Putnam*, 84 Ill. 378, 381; *Moore v. Huntington*, 17 Wall. 417, 422; *Ex parte Railroad Co.*, 95 U. S. 221.

<sup>4</sup> *Cocke v. Trotter*, 10 Yerg. 218; *Kemp v. Mackrell*, 3 Atk. 812; *Hergel v. Laitenberger*, 2 Tenn. Ch. 251.

<sup>5</sup> *Woodrum v. Kirkpatrick*, 2 Swan, 218; *Hergel v. Laitenberger*, 2 Tenn. Ch. 251. But the cross-bill is treated as a separate suit so far as to allow an appeal from an order of dismissal on sustaining a demurrer for want of equity. *Brooks v. Woods*, 40 Ala. 538; *Lehman v. Ford*, 47 Ala. 788. But see *Ayres v. Carver*, 17 How. 591. A cross-bill which was answered should be noticed and disposed of in the final decree. *Moore v. Huntington*, 17 Wall. 417. See, however, *Essex v. Day*, 52 Conn. 484.

<sup>6</sup> *Sale v. McLean*, 29 Ark. 612; *Logan v. McMillin*, 5 Dana, 489. See, also, *Wickliffe v. Clay*, 1 Dana, 589; *Hall v. Edrington*, 8 B. Mon. (Ky.) 47. Cf. *Carroll v. Richardson*, 87 Ala. 605; s. c., 6 So. Rep. 342, where it was held that if upon demurrer to a

§ 447. **Effect of dismissal of the original bill.**—The general rule is that when the original bill is dismissed the cross-bill goes with it.<sup>1</sup> This rule is based upon the idea that the averments of the cross-bill and its subject-matter constitute simply a defense to the original bill, and therefore, having no individuality, no distinctive relief can be granted. But when the cross-bill alleges facts other than those found in the original bill, pertaining to the same subject-matter, and affirmative relief is asked against the complainant upon grounds justifying equitable interference, the dismissal of the original does not carry with it the cross-bill, which remains for disposition in the same manner as if it had been filed as an original bill.<sup>2</sup> There is no retention of the cross-bill, however, when the relief asked by it is directed against a co-defendant instead of the complainant.<sup>3</sup> If a cross-bill is filed against a person who

cross-bill it appears that the original bill is without equity, the cross-bill should be dismissed without considering its sufficiency.

<sup>1</sup> *Abels v. Mobile Real Estate Co.* (Ala.), 9 So. Rep. 428; *Elderkin v. Fitch*, 2 Ind. 90; *Carroll v. Richardson*, 87 Ala. 605; *White v. Wingate* (Wash.), 80 Pac. Rep. 81; *Slason v. Wright*, 14 Vt. 208; *McGuire v. Circuit Judge*, 69 Mich. 598; *Thomason v. Neeley*, 50 Miss. 810; *Lardner v. Ogden*, 81 Miss. 840, 844; *Dows v. Chicago*, 11 Wall. 108; *Markell v. Kasson*, 81 Fed. Rep. 104; *Cross v. De Valle*, 1 Wall. 1. Where the original bill is dismissed at the hearing for want of equity, a cross-bill which seeks to dispossess the complainant from real estate may also be dismissed where the defendant's remedy at law is complete. *Wachter v. Blowney*, 104 Ill. 610. See, also, *Fitzhugh v. Barnard*, 12 Mich. 112, 113. *Cf.* *Loomis v. Freer*, 4 Ill. App. 547.

<sup>2</sup> *Lowenstein v. Glidewell*, 5 Dill. 325, 329; *Fiske v. Wetmore*, 15 R. L. 854, 856; s. c., 5 Atl. Rep. 875; *Jesup*

*v. Ill. Cent. R. Co.*, 48 Fed. Rep. 488, 495; *Wilkinson v. Roper*, 74 Ala. 140; *Abels v. Mobile Real Estate Co.* (Ala.), 9 So. Rep. 428; *Markell v. Kasson*, 81 Fed. Rep. 104; *Worrell v. Wade*, 17 Iowa, 96; *King v. Thorp*, 21 Iowa, 67; *Chicago R. Co. v. Union R. M. Co.*, 109 U. S. 702; *Salem National Bank v. Salem Co.*, 81 Fed. Rep. 580; *Continental Ins. Co. v. Webb*, 54 Ala. 688; *Dawson v. Amey*, 40 N. J. Eq. 494; *Deweese v. Dewees*, 55 Miss. 815; *Jones v. Thacker*, 61 Ga. 829; *Ragland v. Broadnax*, 29 Gratt. 401, 419; *West Va. &c. L. Co. v. Vinal*, 14 West Va. 687. The cross-bill may be retained although the dismissal of the original was upon motion of the complainant. *Sigman v. Lundy*, 66 Miss. 523; s. c., 6 So. Rep. 245. See § 452, n. 4, *infra*.

<sup>3</sup> *Trimble v. Fariss*, 78 Ala. 260; *Lehman v. Dozier*, 78 Ala. 285; *Wilkinson v. Roper*, 78 Ala. 140; *Jones v. Robinson*, 77 Ala. 499; *Gilman v. Railroad Co.*, 72 Ala. 566. But this distinction is now abolished by section 3460 of the Alabama code. *Abels v. Mobile Real Estate Co.* (Ala.), 9 So.



was made a party to the litigation by an amended bill, the dismissal of the latter disposes of the cross-bill as to him.

**§ 448. Miscellaneous irregularities and waiver.**—An irregularity in filing a cross-bill is waived where the complainant answers it without taking any steps to require an answer to the original bill or to restore the latter, the same having been lost.<sup>2</sup> The complainants having answered a cross-bill cannot complain that the notice thereof required by statute was not given them.<sup>3</sup> A decree on a cross-bill without an answer or a rule to answer is erroneous.<sup>4</sup> After a decree settling the rights of the parties has been rendered, it is error to grant leave to answer a cross-bill and to take depositions.<sup>5</sup>

Rep. 428. See *Chicago Artesian Well Co. v. Conn. Mut. L. Ins. Co.*, 57 Ill. 424.

<sup>1</sup> *Wright v. Frank*, 61 Miss. 82.

<sup>2</sup> *Davis v. Hall*, 92 Ill. 85.

<sup>3</sup> *Russell v. Lamb*, 82 Iowa, 558; s. c., 48 N. W. Rep. 939.

<sup>4</sup> *Blair v. Reading*, 99 Ill. 600.

<sup>5</sup> *Scott v. Rowland* (Va.), 4 S. E. Rep. 595. A final decree cannot be attacked in collateral proceedings for

irregularities that did not affect the jurisdiction of the court; as, for instance, where an absent party neglected to plead or answer to a cross-bill after due service of the order, and it was taken for confessed against him before he was ordered to plead, etc., to the original and supplemental bills. *Mellen v. Moline Malleable Iron Works*, 181 U. S. 358.

## CHAPTER XIII.

### DISMISSAL OF BILLS OTHERWISE THAN AT A HEARING.

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| <p>§ 449. Motion to dismiss unauthorized suit.</p> <p>450. Right of complainant to dismiss — (a) Exceptions.</p> <p>451. (b) Exceptions illustrated.</p> <p>452. (c) Proceedings upon a reference as affecting complainant's right.</p> <p>453. (d) The rule in Illinois.</p> <p>454. (e) The same subject continued — Construction of statute.</p> <p>455. (f) Where complainant represents a class.</p> <p>456. (g) Dismissal by one of several complainants.</p> <p>457. (h) Dismissal of part of a bill.</p> <p>458. (i) Dismissal contrary to stipulation.</p> | <p>§ 459. (j) Where complainant is in contempt.</p> <p>460. (k) Dismissal, how effected.</p> <p>461. (l) Costs upon dismissal.</p> <p>462. (m) Dismissal without costs.</p> <p>463. (n) Dismissal without prejudice.</p> <p>464. (o) Reinstatement after dismissal.</p> <p>465. Dismissal for want of prosecution.</p> <p>466. The same subject continued — Reinstatement.</p> <p>467. Dismissal for want of equity.</p> <p>468. Dismissal for want of jurisdiction.</p> <p>469. Compelling complainant to elect.</p> <p>470. The same subject continued.</p> |
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§ 449. Motion to dismiss unauthorized suit.— One in whose name a bill has been filed without authority may move to have it taken off the file or dismissed, and he is entitled to costs of the application as between solicitor and client, and the defendant is entitled to costs as between party and party.<sup>1</sup>

<sup>1</sup>The solicitor who filed the bill may be ordered to pay all the costs. *Palmer v. Walesby*, L. R. 3 Ch. App. 782; *Wright v. Castle*, 8 Mer. 12. See, also, § 88, *supra*; *Jerdein v. Bright*, 10 W. R. 880; *Allen v. Bone*, 4 Beav. 498; *Atkinson v. Abbot*, 8 Drew. 251; *Wade v. Stanley*, 1 J. & W. 674; *Crossley v. Crowther*, 9 Hare, 384. The motion should be supported by affidavit, 1 *Daniell's Ch. Pr.* (5th ed.) 808, and be made promptly upon discovery of the facts and notice given to the solicitor, complainant if any, and, except in case of

a sole plaintiff, the defendant. *Titterton v. Osborne*, 1 Dick. 850; *Tabbernor v. Tabbernor*, 2 Keen, 679; *Hood v. Phillips*, 6 Beav. 176. But it was held in *Town of Kankakee v. Kankakee &c. R. Co.*, 115 Ill. 88, citing *Frye v. Calhoun County*, 14 Ill. 182, that the court may dismiss the bill on its own motion when its attention is called to the facts. One of several complainants cannot have the whole bill dismissed for making him a party without authority. *Fagan v. Fagan*, 15 Ala. 335.

Where a bill was filed in the name of a corporation against a majority of the persons who composed it, and the latter before answer presented a petition asking for a dismissal on the ground of want of authority to institute the suit, the court declined to grant the application at that stage of the case, especially where it appeared that the members authorizing the suit constituted, according to the charter, a quorum of the corporate body.<sup>1</sup>

**§ 450. Right of complainant to dismiss — (a) Exceptions.** It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice on payment of costs is of course except in certain cases.<sup>2</sup> These exceptions were broadly stated by Chancellor Harper, of South Carolina,<sup>3</sup> as follows: — “The exception stated in general terms is that it is within the discretion of the court to refuse him permission to do so if a dismissal would work a prejudice to the other parties; and I gather from the cases compared with each other that it is not regarded as such prejudice to a defendant that the complainant dismissing his own bill may at his pleasure harass him by filing another bill for the same matter. But whenever in the progress of a cause a defendant entitles himself to a decree either against the complainant or against a co-defendant, and a dismissal would put him to the expense and trouble of bringing a new suit and making his proofs anew, such dismissal will not be permitted.”<sup>4</sup> And upon an

<sup>1</sup> *Bethel Church v. Carmack*, 2 Md. Ch. 148. See further as to the credit to be given to the acts of attorneys, *Henck v. Todhunter*, 7 H. & J. 275; § 88, *supra*.

<sup>2</sup> See § 452, n. 4; § 453, n. 1, *infra*. In England since 1845 the rule has been, by virtue of an order in chancery, that a dismissal of a bill after a cause is set for hearing is on the merits and must be a bar to another suit. Gen. Ord. No. 117; *Mayor & Co. v. Charley Water-works Co.*, 2 De G., M. & G. 852; *In re Orrell Collier & Fire Brick Co.*, 12 Ch. Div. 481, 482.

<sup>3</sup> *In Bank v. Rose*, 1 Rich. Eq. 294.

<sup>4</sup> *Bank v. Rose*, 1 Rich. (S. C.) Eq. 294, quoted and approved in *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. Rep. 569. In both cases permission to dismiss was denied because it would prejudice the defendant's right to relief under his cross-bill. See, also, *Booth v. Leicester*, 1 Keen, 247; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602; *Western Union Tel. Co. v. Bell Tel. Co.*, 50 Fed. Rep. 662, 664; *Hat-Sweat Mfg. Co. v. Waring*, 46 Fed. Rep. 87; *Russell v. Lamb*, 82 Iowa, 558; *s. c.*, 48 N. W. Rep. 939. In *Hershberger v.*

extensive review of the authorities, Justice Woods, speaking for the United States Supreme Court, concluded that "after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been concluded, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendants."<sup>1</sup>

§ 451. (b) **Exceptions illustrated.**—A complainant is not entitled as of right to dismiss his bill after the answer is filed, setting up that the license to use a patent upon which the suit is brought is fraudulent and void, and showing that defendant is entitled to a decree for its cancellation.<sup>2</sup> The complainant will not be allowed to discontinue where an injunction has been granted and the defendant seeks, by a cross-bill consonant with the purpose of the original bill, to take advantage of the testimony in the case and to secure rights which he would otherwise have to secure by an independent action.<sup>3</sup> Where a suit to vacate a patent has been pending for several years, and the defendant has sought affirmative relief by his answer, and has failed to file a cross-bill, the complainant will not be allowed to dismiss his bill before the hearing and after proofs have been taken; and it is immaterial that the complainant has sold his patent.<sup>4</sup> After a cross-bill was filed and the issue twice referred to a master, who took a large mass of testimony, exceptions to the report were overruled and an

Blewett, 55 Fed. Rep. 170, after certain interlocutory decrees upon demurrers, and exceptions to answers, the court refused to allow the complainant to dismiss his bill. Whether under the New York code a plaintiff may be permitted to discontinue after a counter-claim has been filed is a question upon which the authorities are divided. *Cockle v. Underwood*, 8 Duer, 676; *Railroad Co. v. Ward*, 18 Barb. 595; *Rees v. Van Patten*, 18 How. Pr. 258; *Young v. Bush*, 86 How. Pr. 240.

<sup>1</sup> *Chicago &c. R. Co. v. Rolling-Mill Co.* (1888), 109 U. S. 702. See, also, *Collins v. Taylor*, 4 N. J. Eq.

163; *State v. Hemingway* (Miss.), 10 So. Rep. 575; *Guilbert v. Hawles*, 1 Ch. Cas. 40; *Lashley v. Hogg*, 11 Ves. Jr. 602; *Biscoe v. Brett*, 2 Ves. & B. 377; *Collins v. Greaves*, 5 Hare, 596; *Gregory v. Spencer*, 11 Beav. 143; *Anon.*, 11 Ves. Jr. 461; *Bethia v. McKay*, Cheves' (S. C.) Eq. 96; *Adger v. Pringle*, 11 S. C. 527, 547; *Aucker v. Levy*, 8 Strob. (S. C.) Eq. 210.

<sup>2</sup> *Hat-Sweat Manuf'g Co. v. Waring*, 46 Fed. Rep. 87.

<sup>3</sup> *Pullman's Palace Car Co. v. Central Transp. Co.*, 49 Fed. Rep. 261.

<sup>4</sup> *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602.

interlocutory decree rendered in both the original and cross-cause; and, where the defendant's claim would be barred by the statute of limitations if not established in the pending suit, it was held that the court would have "trifled with the administration of justice" had it allowed the original bill to be dismissed without the consent of the defendant.<sup>1</sup>

**§ 452. (c) Proceedings upon a reference as affecting complainant's right.**— It has been held that a complainant may dismiss his bill after the report of a master upon a reference;<sup>2</sup> and on the other hand, that after a sale and an account stated by the master adversely to the complainant, and excepted to, the defendant has a right to remain in court.<sup>3</sup> At a hearing before a master it was agreed that, prior to the filing of his report, a draft should be submitted to counsel, in order that they might present objections thereto. The master, however, inadvertently filed the report without so doing. Subsequently he withdrew it by consent of counsel, other proceedings were had before him, and objections were presented to the report. It was decided that the cause stood as if no report had ever been filed, and that the defendant had acquired no such right as would exclude the operation of the general rule that, where the defendant demands no affirmative relief, the complainant may, upon paying costs, dismiss his bill at any time before interlocutory or final decree.<sup>4</sup>

<sup>1</sup> *Chicago &c. R. Co. v. Rolling Mill Co.*, 109 U. S. 702. After a final decree has been reversed on appeal for want of equity and remanded, leave to the complainant to dismiss without prejudice is never granted as a matter of course. There should be good reasons to support such an indulgence, as where the dismissal is occasioned by some slip or mistake in the pleadings or proof. *Flaherty v. McCormick*, 123 Ill. 525; *Byrne v. Frere*, 2 Molloy, 157; *Ogsbury v. La Forge*, 2 N. Y. 114. Section 4190 of the Georgia code provides that "The complainant may dismiss his bill at any time, either in term or vacation, so that he does not thereby prejudice

any right of the defendant. If equitable claims by way of set-off or otherwise have been set up by answer, the dismissal of the bill shall not interfere with the defendant's rights to a hearing and trial of such claims in that proceeding." This provision was construed in *Evans v. Sheldon*, 69 Ga. 100; *Harris v. Hines*, 59 Ga. 427; *Kean v. Lathrop*, 58 Ga. 355; *Jones v. Thacker*, 61 Ga. 329.

<sup>2</sup> *Bassard v. Lester*, 2 McCord (S. C.), Ch. 419. But see *Bethia v. McKay*, 1 Cheves (S. C.), 98.

<sup>3</sup> *Fisher v. Stovall*, 85 Tenn. 316.

<sup>4</sup> *Western Union Tel. Co. v. American Bell Tel. Co.*, 50 Fed. Rep. 662. Cf. *Moriarty v. Mason*, 47 Conn. 436.

**§ 453. (d) The rule in Illinois.**—In Illinois the right of a defendant who has filed a cross-bill to prosecute the same to effect is secured by statute. Otherwise the complainant's privilege of discontinuing his suit at any time before final de-

In the case first cited Judge Colt discussed the question as follows:—"It is admitted that under Equity Rule 90 this court is governed by the equity practice of the high court of chancery of England as it existed in 1842, the time of the adoption of the rule [see § 3, *supra*]. Under that practice the general rule was that a complainant might dismiss his bill upon payment of costs at any time before interlocutory or final decree, and this has been the general practice both in the federal and State courts. There are, however, certain well-recognized exceptions to this rule, and the question which arises upon this motion is whether the defendant comes within any of these exceptions. These exceptions are based upon the principle that a complainant should not be permitted to dismiss his bill when such action would be prejudicial to the defendant. But this does not mean that it is within the discretion of the court to deny the complainant this privilege under any circumstances where it might think such dismissal would work a hardship to the defendant, as, for example, where it might burden him with the trouble and annoyance of defending against a second suit; but it means that if during the progress of the cause the defendant has acquired some right, or if he seeks or has become entitled to affirmative relief so that it would work an actual prejudice against him to have the case dismissed, then the complainant will not be permitted to dismiss his bill. To hold otherwise would be to do away with the general rule alto-

gether, and to make the question simply one of discretion on the part of the court. Where issues are framed out of chancery and decided by a jury, that would be such a determination of the case as to forbid the complainant to dismiss his bill without prejudice, because the defendant has acquired a new right; and so where a master has filed his report and his findings against the complainant, I do not think, for the same reason, he should be allowed to dismiss his bill. Again, where the defendant has filed a cross-bill, or where he seeks affirmative relief in his answer, or where, without specifically asking for affirmative relief in his answer, the evidence discloses that he is entitled to such relief, these are circumstances where the complainant should not be allowed to dismiss his bill. But where there has been no interlocutory or final decree and no determination of the cause in any way, and the defendant seeks no affirmative relief, or, in other words, where the bringing of another suit will merely subject him to the annoyance of a second litigation, the complainant has a right to dismiss his bill without prejudice upon payment of costs. It seems to me that this case is quite parallel with the leading case of *Carrington v. Holly*, 1 Dickens, 280, where the plaintiff filed his bill to establish his right to certain estates, and an issue to a jury was directed. The plaintiff then moved to dismiss his bill with costs, and the defendant applied to have the order granting this motion set aside. Lord Hardwicke said:—"There hath not

cree is practically absolute, and the court has no discretion to deny him permission arising out of hardship to the defendant.<sup>1</sup>

been any determination. The directing of an issue is merely to satisfy the conscience of the court prefatory to giving judgment. That issue hath not been tried, and till there hath been a determination, I hold a plaintiff may in any stage of the case apply to dismiss his bill upon payment of costs. Had there been a decree it would have been otherwise. So, likewise, it would have been had the issue been tried and a verdict in favor of the defendant.' While it cannot be said that the authorities are entirely harmonious, I think the leading cases in this country and in England support the views herein expressed. *Handford v. Storie*, 2 Sim. & Stu. 196; *White v. Lord Westmeath*, Beat. 174; *Curtis v. Lloyd*, 4 Myl. & C. 194; *Black v. Calnaghi*, 9 Sim. 411; *Booth v. Leycester*, 1 Keen, 247; *Cooper v. Lewis*, 2 Phil. Ch. 178; *Chicago & C. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702; s. c., 8 S. Ct. Rep. 594; *Badger v. Badger*, 1 Cliff. 237; *American Zylonite Co. v. Celluloid Mfg. Co.*, 82 Fed. Rep. 809; *Stevens v. The Railroads*, 4 Fed. Rep. 97; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602; *Conner v. Drake*, 1 Ohio St. 167; *Cozzens v. Sisson*, 5 R. L. 489; *Dawson v. Amey*, 40 N. J. Eq. 494; s. c., 4 Atl. Rep. 442; *Saylor's Appeal*, 39 Pa. St. 495; *Cummins v. Bennett*, 8 Paige, 79; *Vaneman v. Fairbrother*, 7 Blackf. 541; *Watt v. Crawford*, 11 Paige, 470; *Bullock v. Zilley*, 5 N. J. Eq. 77; *Babb v. Mackey*, 10 Wis. 314; *Seymour v. Jerome*, Walk. Ch. (Mich.) 356." See, also, *Bynum v. Powe*, 97 N. C. 374; *McKisson v. Hunt*, 64 N. C. 300; *Pescud v. Hawkins*, 71 N. C. 300; *Graham v. Tate*, 77 N. C. 120; *Tate*

*v. Phillips*, 77 N. C. 126; *Purnell v. Vaughan*, 80 N. C. 46; *Whedbee v. Leggett*, 92 N. C. 469; *Bank v. Stewart*, 93 N. C. 402; *McNeill v. Lawton*, 97 N. C. 16. As to the effect upon a cross-bill of the dismissal of the original bill, see § 447, *supra*.

<sup>1</sup> *Reilly v. Reilly* (Ill.), 28 N. E. Rep. 960, 961 (Bailey, J., dissenting), reversing s. c., 26 N. E. Rep. 604. The opinion, quoting 1 Daniell's Ch. Pr. (5th ed.) 792, 793, then proceeds as follows:—"In *Mohler v. Wiltberger*, 74 Ill. 163, the same question arose, and following Mr. Daniell we said:—'We understand the practice to be well settled that the complainant at any time prior to a decree has the right, unless a cross-bill has been filed, to control the fortunes of his own bill and dismiss it as a matter of course. In *Purdy v. Henslee*, 97 Ill. 389, where on the hearing the chancellor orally announced his conclusions, which were adverse to the complainant, and thereupon before any final decree was entered complainant asked to dismiss his bill, which was granted, and the bill was dismissed against the defendants' protest, it was held, there being no cross-bill filed, the court made a proper disposition of the case. It is there said:—'By the English chancery practice the complainant retains the absolute control of the suit and may dismiss it if he chooses at any time before decree actually rendered.' The English practice is in force here except so far as has been changed by our statute. The question again arose in *Blair v. Reading*, 99 Ill. 600, and the court again held that a complainant has the right at any time before the hearing to dismiss his bill



§ 454. (e) **The same subject continued — Construction of statute.**— The statutory provision in Illinois that a complainant cannot dismiss after cross-bill without the defendant's consent does not prevent his dismissing as to a defendant who has not himself filed a cross-bill nor joined in one filed by a co-defendant.<sup>1</sup> Nor does it apply where the cross-bill has been dismissed upon demurrer.<sup>2</sup> And where the complainant moves to dismiss his bill before the defendant asks leave to file a cross-bill, the former motion has precedence and should be first decided.<sup>3</sup>

§ 455. (f) **Where complainant represents a class.**— Where a complainant files a bill on behalf of himself and all others of the same class, he retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure.<sup>4</sup> But after a decree he cannot thus deprive the other persons of the same class of the benefit of the decree if they think fit

at his own costs, either as to all or a part of the defendants, in the absence of a statutory regulation. In the later case of *Gage v. Bailey*, 119 Ill. 589; s. c., 9 N. E. Rep. 199, it was again declared that the general rule was that a complainant may dismiss his bill at any time he may desire before a final decree has been entered in the cause. It would therefore seem that in this State at least the rule is well settled that where no cross-bill has been filed the complainant has the right at any time before final decree to dismiss his bill upon payment of costs, and the rule that we have adopted is sustained by the courts of other States. *Simpson v. Brewster*, 9 Paige, 245; *Cummins v. Bennett*, 8 Paige, 79; *Smith v. Smith*, 2 Blackf. (Ind.) 288; *Cook v. Walker*, 24 Ga. 381; *Mason v. Railroad Co.*, 52 Me. 82. There are some cases holding that the chancellor has a discretion, and may in certain cases likely to work a hardship to a defendant refuse to allow the com-

plainant to dismiss his bill, but these cases are not in our opinion in harmony with the current of authority, and we are not inclined to change the rule we have established."

<sup>1</sup> *Blair v. Reading*, 99 Ill. 600.

<sup>2</sup> *Ogle v. Koerner* (Ill.), 29 N. E. Rep. 563.

<sup>3</sup> *Blair v. Reading*, 99 Ill. 600.

<sup>4</sup> *Handford v. Storie*, 2 Sim. & Stu. 196; *Innes v. Lansing*, 7 Paige, 588; *Pemberton v. Topham*, 1 Beav. 816; *Wood v. Westfall*, *Younge*, 805; *Mattison v. Demarest*, 1 Rob. (N. Y.) 717; *McDougald v. Dougherty*, 11 Ga. 570; *Stephenson v. Taverners*, 9 Gratt. 398; *Thompson v. Fidler*, 33 N. J. Eq. 480. And the defendant himself may claim the right to have the bill dismissed upon what is due the particular creditor by whom a creditor's bill is brought, together with his costs of suit, *Innes v. Lansing*, 7 Paige, 588, 585, unless there are several complainants, in which case he must satisfy all of them. *Thompson v. Fidler*, 33 N. J. Eq. 480, 482.

to prosecute it.<sup>1</sup> Nor can such complete control of the suit be exercised by the original complainant alone if there be other complainants. Thus where a complainant files a creditor's bill, and upon his invitation other creditors are admitted as co-complainants, he cannot have a dismissal against their objection; and if he unduly delays the prosecution of the suit, the conduct of the cause may be committed to the new parties.<sup>2</sup>

**§ 456. (g) Dismissal by one of several complainants.**—One of several complainants may dismiss the suit as to himself, unless some other party to the action has acquired some right or advantage, or a defendant shall have properly set up a claim for affirmative relief affecting adversely the party seeking to retire, and that the party objecting is entitled to have settled and determined in the suit.<sup>3</sup> It seems that in England one of the parties complainant cannot thus withdraw unless the defendant consents, for the effect is to diminish the security of the defendant for costs.<sup>4</sup>

**§ 457. (h) Dismissal of part of a bill.**—It was declared by Judge McCrary in the United States circuit court that "there is no doubt but that the complainant has a right to dismiss his suit in whole or in part," and he allowed an application to dismiss part of the bill.<sup>5</sup> No authority was cited, and according to a deliberate ruling of the New Jersey court of chan-

<sup>1</sup> Handford v. Storie, 2 Sim. & Stu. 196. See, also, Carrington v. Holly, 1 Dick. 280; Guilbert v. Hawles, 1 Ch. Cas. 40.

<sup>2</sup> Belmont Nail Co. v. Columbia Iron & Steel Co., 46 Fed. Rep. 386; and as to the last point, Thompson v. Fisler, 38 N. J. Eq. 480, where a motion for permission to conduct the suit was granted upon terms that the original complainant be indemnified against all future costs. See, also, Strike's Case, 1 Bland, 57, 85; Williamson v. Wilson, 1 Bland, 418, 434; Bank v. Dugan, 2 Bland, 254; Miller v. Liggett & M. Tobacco Co., 7 Fed. Rep. 91; *Ex parte*

Railroad Co., 95 U. S. 221; Fay v. Bank, Har. (Mich.) 194.

<sup>3</sup> Gatewood v. Leak, 99 N. C. 363; s. c., 6 S. E. Rep. 706; Muldrow v. De Bose, 2 Hill's (N. C.) Ch. 375, 377, and Holkirk v. Holkirk, 4 Mad. 50, illustrate the qualification stated in the text. In the first case the dismissal was allowed on special terms. See, also, Winthrop v. Murry, 7 Hare, 152.

<sup>4</sup> Langdale v. Langdale, 13 Ves. 167; 1 Daniell's Ch. Pr. (5th ed.) 792, 808.

<sup>5</sup> In Lyster v. Stickney, 12 Fed. Rep. 609.

cery, "there is no precedent for allowing a complainant to dismiss his own bill as to part of the relief prayed for in it and permitting him to proceed with the residue. The decrees [to the contrary] quoted from the books of precedents are all decrees made upon the hearing of the cause."<sup>1</sup>

**§ 458. (i) Dismissal contrary to stipulation.**—Where it was stipulated by the parties and made a part of the record that a certain decree should be entered in the cause, it was held that the complainant thereby relinquished all power over the case and the court reversed an order granting him permission to dismiss the bill.<sup>2</sup> So where a stipulation upon a bill for an account provided for an arbitration and that the award should be the basis of a decree by the court and should be entered as the finding of the court as to the accounts, the complainant was not allowed to dismiss his bill after the overruling of his motion to set aside the award.<sup>3</sup>

**§ 459. (j) Where complainant is in contempt.**—The broad rule that when a party is in contempt he cannot be heard until he has cleared his contempt undoubtedly qualifies the right of the complainant to dismiss his bill.<sup>4</sup> But where the court made an order requiring the complainant within a certain time to pay into court the amount admitted by the bill to be due, and he failed to comply therewith, and also omitted to answer the interrogatories of the defendant, which were taken as confessed, it was not deemed such a contumacy as of itself to fix the complainant in contempt in the technical sense of the term.<sup>5</sup> Nor does the neglect to file a replication within the time allowed by the rules constitute a contempt in this behalf.<sup>6</sup>

<sup>1</sup> *Camden &c. R. Co. v. Stewart*, 19 N. J. Eq. 69, holding that the proper course is to amend. See *New Jersey Rule in Chancery* 94.

<sup>2</sup> *Coultas v. Green*, 48 Ill. 377, recognizing the general rule, but holding it inapplicable where a positive agreement is made. In *Toupin v. Gargines*, 12 Ill. 79, an action at law,

the parties were compelled to abide by a verbal order to dismiss the suit.

<sup>3</sup> *Ives v. Ashelby*, 26 Ill. App. 244.

<sup>4</sup> *Doe v. Newland*, 2 Blackf. 282.

<sup>5</sup> *Doe v. Newland*, 2 Blackf. 282, holding that an adjudication was necessary to preclude the complainant from moving to dismiss.

<sup>6</sup> *Sea Ins. Co. v. Day*, 9 Paige, 247.

§ 460. (k) Dismissal, how effected.—The complainant cannot dismiss his suit without an order of the court,<sup>1</sup> which may be granted upon motion or petition<sup>2</sup> after notice.<sup>3</sup> A motion by the plaintiff, before hearing, “for leave to enter a discontinuance,” although informal, is equivalent to a notice for an order dismissing the bill.<sup>4</sup> Where a written dismissal was filed, but no leave to dismiss was obtained, and the complainant continued to prosecute his suit, the dismissal was presumed to have been withdrawn.<sup>5</sup>

§ 461. (l) Costs upon dismissal.—Although a defendant absconds and thereby the object of the suit is defeated, yet a complainant upon motion cannot dismiss his bill without costs.<sup>6</sup> It is proper for a junior mortgagee, made a defendant in a foreclosure suit, to appear in the suit so as protect his rights; and the suit cannot be discontinued without paying him his taxable costs.<sup>7</sup> Where the complainant obtains an order of dismissal upon payment of costs the suit is not out of court, except at the election of the defendant, until he has paid

<sup>1</sup> Electric Accumulator Co. v. Brush Electric Co., 44 Fed. Rep. 602, 604; Conner v. Drake, 1 Ohio St. 170; Newcomb v. White (New Mex.), 23 Pac. Rep. 671; Adger v. Pringle, 11 S. C. 527. He cannot discontinue upon an *ex parte* entry in the common rule-book. American Zylonite Co. v. Celluloid Mfg. Co., 32 Fed. Rep. 809. If he enters a common order for absolute dismissal without permission, the defendant may apply to set it aside, or he may treat it as regular and proceed to collect his costs. Saxton v. Stowell, 11 Paige, 526. Complainant cannot dismiss after decree, even by consent of parties, without a rehearing or special order. Watt v. Crawford, 11 Paige, 470. An order of dismissal obtained contrary to stipulation may be vacated. Betts v. Barton, 8 Jur. (N. S.) 154. “Our courts have decided that a mere agreement to refer the matters in controversy in a suit to an arbitra-

tion to hear and decide the same is a discontinuance of the suit.” Chancellor Walworth in Bank of Monroe v. Widner, 11 Paige, 529.

<sup>2</sup> 1 Daniell’s Ch. Pr. (5th ed.) 790, where it is said the application is usually made by petition. In North Carolina a motion for discontinuance may be heard and determined out of term time by consent of the parties, Bynum v. Powe, 97 N. C. 374; s. c., 2 S. E. Rep. 170; but not otherwise. Gatewood v. Leak, 99 N. C. 363; s. c., 6 S. E. Rep. 706.

<sup>3</sup> American Zylonite Co. v. Celluloid Mfg. Co., 32 Fed. Rep. 809.

<sup>4</sup> Kempton v. Gurgess, 136 Mass. 192.

<sup>5</sup> Newcomb v. White (New Mex.), 23 Pac. Rep. 671.

<sup>6</sup> Palmer v. Van Doren, 2 Edw. Ch. 384.

<sup>7</sup> Smack v. Duncan, 4 Sandf. Ch. 621.

or offered to pay the costs, and the defendant may consider the case in court and proceed as if no order had been granted,<sup>1</sup> or he may treat the bill as dismissed and apply to the court to enforce the payment of his costs.<sup>2</sup> The court has a right to require the costs to be paid or secured before granting leave to discontinue.<sup>3</sup> Where the complainant after the filing of an answer moved to dismiss without prejudice, leave was granted upon condition that he pay the reasonable counsel fees of the defendant together with the taxed costs.<sup>4</sup>

§ 462. (m) The same subject continued — Dismissal without costs.— Before the defendant's appearance it is the regular practice to permit a complainant to dismiss his bill without costs.<sup>5</sup> After appearance it was formerly considered in England that a complainant could not be permitted to have his bill dismissed without costs, unless by consent of the defendant in open court, or by agreement in writing;<sup>6</sup> but that rule has been departed from in the later English cases under special circumstances.<sup>7</sup> The old practice, however, still obtains in New Jersey.<sup>8</sup> While an injunction under a judgment creditor's bill was upon furniture, the latter was taken and sold under a distress for rent. There was no other property.

<sup>1</sup> *McKeuster v. Van Zandt*, 1 Wend. 18; *James v. Delavan*, 7 Wend. 511; *White v. Smith*, 4 Hill, 166; *Robinson v. Taylor*, 12 Wend. 191. Until the costs are paid the pendency of the suit may be pleaded in abatement of another suit for the same matter. *Saxton v. Stowell*, 11 Paige, 526.

<sup>2</sup> *Jerome v. Seymour*, Walk. Ch. 859; *Cummins v. Bennett*, 8 Paige, 79. When leave was granted on payment of costs, but the order was entered without mentioning costs, it was amended upon application of the defendant. *Jerome v. Seymour*, Walk. Ch. 359.

<sup>3</sup> *Smith v. Smith*, 2 Blackf. (Ind.) 232, 233. See, also, *Newcomb v. White* (New Mex.), 28 Pac. Rep. 671.

<sup>4</sup> *Wilkinson v. Wilkinson*, 2 R. I. 414.

<sup>5</sup> *Thompson v. Thompson*, 7 Beav. 850, where an assignee in insolvency dismissed his supplemental bill. See, also, *Lord Huntingtower v. Sherborn*, 5 Beav. 380.

<sup>6</sup> *Fidelle v. Evans*, 1 Bro. C. C. 267; *Anon.*, 1 Ves. Jr. 140; *Dixon v. Parks*, 1 Ves. Jr. 402.

<sup>7</sup> *Knox v. Brown*, 2 Bro. C. C. 186; s. o., 1 Cox, 859; *Broughton v. Lashmar*, 5 M. & C. 186, 144; *Hawkins v. Gardiner*, 17 Jur. 780; *Robinson v. Rosher*, 1 Y. & Coll. C. C. 7, 12; *Lister v. Leather*, 1 De G. & J. 361; *Sutton Harbor Co. v. Hitchens*, 15 Beav. 161. See *Elsey v. Adams*, 10 Jur. (N. S.) 459; *South Staffordshire Ry. Co. v. Hall*, 16 Jur. 160.

<sup>8</sup> *Fisher v. Quick*, 9 N. J. Eq. 312.

The court allowed the complainant to dismiss his bill without costs.<sup>1</sup> Where a defendant in a creditor's suit was discharged under a bankrupt act subsequent to the commencement of the suit, the complainant was permitted to dismiss his bill as to such defendant without costs.<sup>2</sup>

§ 463. (n) Dismissal without prejudice.— When a bill is dismissed upon the motion of the complainant it is a safe, convenient and usual practice to dismiss it without prejudice.<sup>3</sup> And an absolute dismissal will be corrected in a proper case on appeal.<sup>4</sup> Where no words of qualification appear in the order of dismissal, it is presumed to be rendered on the merits, and is a bar to a subsequent bill for the same cause.<sup>5</sup>

§ 464. (o) Reinstatement after dismissal.— It was held in an early case in the New York court of chancery that a suit once voluntarily dismissed can never be reinstated unless the order was obtained 'by fraud.'<sup>6</sup> It was decided in Georgia that a complainant being allowed to dismiss his bill without prejudice may move to reinstate the cause, and that the motion should be granted if the dismissal was superinduced by an error of the court; as where by an erroneous ruling the complainant was driven to the necessity of submitting to a verdict against him by the jury or of dismissing his bill. The denial of the motion was reversed on appeal.<sup>7</sup>

§ 465. Dismissal for want of prosecution.— The court will not dismiss for want of prosecution where the delay was at

<sup>1</sup> Leggett v. Boorum, 2 Edw. Ch. 680.

<sup>2</sup> Pratt v. Babcock, 10 Paige, 295.

<sup>3</sup> Kempton v. Burgess, 186 Mass. 192, 198.

<sup>4</sup> Durant v. Essex Co., 7 Wall. 107.

<sup>5</sup> Borrowdale v. Tuttle, 5 Allen, 377; Howth v. Owens, 30 Fed. Rep. 910; Lyon v. Perin & Co., 125 U. S. 698; Kempton v. Burgess, 186 Mass. 192, 198; Durant v. Essex Co., 7 Wall. 107. See Carter v. Wabash & Co., 187 Mass. 186; Hughes v. United States, 4 Wall. 282. Where the com-

plainant moved to dismiss the bill "without prejudice" and the court refused so to dismiss, but dismissed it "with prejudice," it was held in Indiana that the insertion of these words did not bar a subsequent suit for the same cause at law or in equity. Vaneman v. Fairbrother, 7 Blackf. 541.

<sup>6</sup> Orphan Asylum v. M'Carter (1825), Hopk. Ch. 872. See Robson v. Cranwell, 1 Dick. 61.

<sup>7</sup> Warner v. Graves, 25 Ga. 869.

the request of the defendant and for his benefit.<sup>1</sup> Negotiations for a settlement are not sufficient to excuse a default in the regular proceedings of the court, without the express agreement of the parties.<sup>2</sup> Although a solicitor appears for more than one defendant and only one puts in an answer, the latter may move to dismiss for want of prosecution, and it is not enough to show that such solicitor should have got in all the answers.<sup>3</sup> The rule of the New Jersey court of chancery, providing that if a suit be not prosecuted for one year the bill may be dismissed, can only be taken advantage of by application to the court while as yet the cause sleeps, or at least before the defendant has precluded himself by laches, or by a waiver, actual or presumed, from the benefit of it.<sup>4</sup> The time during which an application in a case is under consideration by the court is not counted in making up the period of laches.<sup>5</sup> After the expiration of two years from the time a bill was filed, no subpoena having been taken out, the bill was dismissed upon the motion of the defendant, who appeared specially for that purpose.<sup>6</sup> Where a motion was made to dismiss the bill on the ground of delay, and the complainant speeded the cause in the interval between the notice and the making of the motion, his bill was not dismissed, but he was ordered to pay the costs of the motion.<sup>7</sup> If at the time of the hearing a plaintiff in equity is not ready to go on, and the

<sup>1</sup> *Person v. Nevitt*, 82 Miss. 180; *Doyle v. Devane*, 1 Freem. (Miss.) Ch. 845. See, also, *Dixon v. Rutherford*, 26 Ga. 158.

<sup>2</sup> *Norton v. Kosboth*, Hopk. Ch. 101.

<sup>3</sup> *De Luze v. Loder*, 3 Edw. Ch. 419. See, also, *Vermillyea v. Odell*, 4 Paige, 121. Where upon receipt of notice of motion to dismiss a bill for want of prosecution, the solicitor for the complainant furnished to the adverse party satisfactory evidence that the neglect to proceed to put the cause in readiness to take testimony arose from accident or mistake, and offered to pay the costs which had accrued upon the notice previous to such offer, and showed that the cause was then in readiness

to take testimony, and the defendant's solicitor refused to withdraw his application, the court denied the motion without allowing costs to the applicant. *Germain v. Beach*, 9 Paige, 232.

<sup>4</sup> *Home Ins. Co. v. Howell*, 24 N. J. Eq. 239. For dismissal for laches under this rule see, also, *Sebring v. Sebring*, 43 N. J. Eq. 59; and for mere delay in the absence of a rule. *Wilson v. Rushing*, 13 Phila. 48; *M'Dowell v. Logsdon*, 3 Bibb (Ky.). 229.

<sup>5</sup> *Day v. Hathaway Printing &c. Co.*, 41 N. J. Eq. 419, 420.

<sup>6</sup> *Bancroft v. Sawin*, 143 Mass. 144.

<sup>7</sup> *Tingle v. Parter*, 3 Edw. Ch. 228.



court refuses to grant further time, he may move for an order dismissing his bill, which should be granted upon payment of the costs; if he does not do so the defendant is not entitled to a decree upon the merits, but can only have the bill dismissed for want of prosecution; and such a dismissal, like a dismissal upon the plaintiff's motion, is not a bar to a new bill.<sup>1</sup> If the case is set down on the trial docket through inadvertence before it is ready for hearing it is the duty of the complainant to have the order set aside, and if he does not, he cannot complain that the bill is dismissed for want of prosecution when reached in his absence on a call of the docket.<sup>2</sup> The filing of a replication after notice given of a motion to dismiss the bill for want thereof is good cause against the motion; but it will only be allowed on payment of costs.<sup>3</sup> A decree erroneously dismissing a bill for want of equity instead of for want of prosecution should be reversed and a dismissal without prejudice ordered.<sup>4</sup> A peremptory order of dismissal for want of prosecution, without notice, or giving reasonable time to proceed, is erroneous.<sup>5</sup> Where a defendant after answering, taking proofs, etc., moved to dismiss for want of prosecution, the court ordered the bill to be retained to prevent the operation of the statute of limitations in case the plaintiff should sue at law.<sup>6</sup>

<sup>1</sup> *Kempton v. Burgess*, 186 Mass. 192, 193. A dismissal for want of prosecution while the cause is pending on a reference before a master is not necessarily or presumptively erroneous. *Gordon v. Gordon*, 25 Ill. App. 810. Where a non-resident asks the aid of the court, and then refuses to submit himself to examination as a witness, the court may dismiss his bill or assume as true the material facts alleged, about which he refuses to appear and testify. *Davis v. Flagg*, 44 N. J. Eq. 109; s. c., 13 Atl. Rep. 257. As to the effect of the dismissal as *res adjudicata*, see *Cheney v. Stone*, 29 Fed. Rep. 885. The Washington Code of Procedure, section 1665, providing that, upon the

refusal of a party to answer interrogatories filed, his pleading may be stricken out and judgment rendered against him; merely authorizes a judgment of dismissal, and not for relief prayed by the party filing the interrogatories. *Waite v. Wingate* (Wash.), 80 Pac. Rep. 81.

<sup>2</sup> *Cleaver v. Smith*, 114 Ill. 114.

<sup>3</sup> *Griswold v. Inman*, Hopk. Ch. 86.

<sup>4</sup> *Cleaver v. Smith*, 114 Ill. 114.

<sup>5</sup> *Kain v. Ross*, 8 Lea, 76, the decision resting partly upon the provisions of the code. See, also, *Dixon v. Rutherford*, 26 Ga. 158; *Warren v. Shaw*, 43 Me. 29.

<sup>6</sup> *Martin v. Maberry*, 1 Dev. (N. C.) Eq. 169.

§ 466. The same subject continued — Reinstatement.— It was held in Virginia that after the entry of an order dismissing a suit for want of prosecution, the case can be reinstated only in the statutory mode. Such a decree is a final decree.<sup>1</sup> In Illinois a bill was dismissed for want of prosecution, and afterwards at the same term the order of dismissal was vacated and the cause reinstated without notice to the defendant. It was held that having been brought into court by the service of process the defendant was bound to take notice of orders properly made in the cause.<sup>2</sup>

§ 467. Dismissal for want of equity.— It is not proper practice to move to dismiss a bill for want of equity simply upon notice. The matter should come before the court upon demurrer.<sup>3</sup>

<sup>1</sup> Jones v. Turner, 81 Va. 709.

<sup>2</sup> Smith v. Brittenham, 98 Ill. 188.

<sup>3</sup> Conover v. Ruckman, 82 N. J. Eq. 685. See, also, Betts v. Lewis, 19 How. 72; Fuller v. Mut. L. Ins. Co., 81 Fed. Rep. 696. In the case first cited Vice Chancellor Van Fleet said: — “Swedesborough Church v. Shivers, 16 N. J. Eq. 458, is cited as an authority, but it is not, the motion there being based upon the maxim *de minimis non curat lex*. Two cases of motions of this kind seem to have been entertained by the court (Carlisle v. Cooper, 18 N. J. Eq. 247; Curry v. Glass, 25 N. J. Eq. 108). But it will be observed in each the chancellor was careful to state that they were entertained because the counsel for the complainant consented that the case should be considered as though before the court on demurrer. . . . These are the only cases of which I have any knowledge which give the least countenance to the practice sought to be established by this motion. They are not precedents, and however apparent it may seem that such practice would tend to promote dis-

patch and economy in the administration of justice, I do not feel at liberty to depart from what I consider the settled practice in such cases.” A motion to dismiss for want of equity is treated in Illinois as a general demurrer, but conceded not to be according to generally approved practice. Grimes v. Grimes (Ill.), 82 N. E. Rep. 847. See, also, Vieley v. Thompson, 44 Ill. 9; Hickey v. Stone, 60 Ill. 458; Emerson v. Railroad Co., 75 Ill. 176; Thomas v. Adams, 80 Ill. 87. It is also permitted in some other States by express statute or peculiarities of local practice. See Thompson v. Paul, 8 Humph. 114; Henderson v. Matthews, 1 Lea, 84; Quinn v. Leake, 1 Tenn. Ch. 67; Tyne v. Dougherty, 3 Tenn. Ch. 49; Earles v. Earles, 8 Head, 367; Mayse v. Biggs, 8 Head, 36; Merriman v. Norman, 9 Heisk. 269; Knight v. Atkinson, 2 Tenn. Ch. 884; Anderson v. Mullenix, 5 Lea, 287; Randall v. Payne, 1 Tenn. Ch. 187; Colville v. Colville, 9 Humph. (Tenn.) 524; Kerr v. Kerr, 3 Lea, 227; Holman v. Holman, 8 Desaus. (S. C.) 210; Coston v. Cos-

§ 468. Dismissal for want of jurisdiction.— The federal judiciary act of 1875 provides that “if in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.”<sup>1</sup> Under this statute the court may at any time, without plea and without motion, dismiss the suit the moment a fraud on its jurisdiction is discovered.<sup>2</sup> “Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction that the court

ton, 66 Ga. 882; Hargraves v. Jones, 27 Ga. 288; May v. Goodwin, 27 Ga. 352; Haynes v. Short, 88 Ala. 562; s. c., 7 So. Rep. 157; Glover v. Hembree, 82 Ala. 324; Seals v. Robinson, 75 Ala. 863; Peter v. Kahn (Ala.), 9 So. Rep. 729. A bill will be dismissed on petition of the defendant where it appears that a compromise has been made with the complainant, although another person not a party to the record has an interest in the subject-matter of the suit and resists the motion for discontinuance. Giddings v. Eastman, Clarke's Ch. 19.

In the federal courts a dismissal for want of equity can be made only at a hearing. La Vega v. Lapsley, 1 Woods, 428; Betts v. Lewis, 19 How. 72; Fuller v. Metropolitan Ins. Co., 81 Fed. Rep. 696.

<sup>1</sup> Act of March 3, 1875, ch. 137, § 5 (18 St. at L. 472). See § 83, *supra*. Before this act a plea to the merits was a waiver of want of jurisdiction. Farmington v. Pillsbury, 114 U. S. 138, 143, and cases there cited.

<sup>2</sup> Williams v. Nottawa, 104 U. S. 209, 211; Hartog v. Memory, 116 U. S. 588, 590.

can dismiss the case upon the motion of either party.”<sup>1</sup> “If from any source the court is led to suspect that its jurisdiction has been imposed upon, . . . it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding. . . . But the evidence on which the circuit court acts in dismissing the suit must be pertinent either to the issue made by the parties or to the inquiry instituted by the court.”<sup>2</sup> . . . And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an opportunity to be heard upon the motion and to meet it by appropriate evidence.”<sup>3</sup> A dismissal cannot be sustained unless the facts when made to appear on the record create a legal certainty of the want of jurisdiction.<sup>4</sup> An objection to the jurisdiction “ought to be raised at the first opportunity, and delay in its presentation should be considered in examining into the grounds upon which it is alleged to rest.”<sup>5</sup> And a dismissal under the statute should be made without prejudice.<sup>6</sup>

<sup>1</sup> Waite, C. J., in *Hartog v. Memory*, 116 U. S. 588, 590. See, also, *Deputron v. Young*, 184 U. S. 241; *Railroad Co. v. Quigley*, 21 How. 202, 214.

<sup>2</sup> “And must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal.” *Hartog v. Memory*, 116 U. S. 588, 591; *Barry v. Edmunds*, 116 U. S. 550.

<sup>3</sup> Waite, C. J., in *Hartog v. Memory*, 116 U. S. 588, 591. See, also, *Morris v. Gilmer*, 129 U. S. 315. As to dismissal of suits brought by assignees which could not have been maintained by the assignors, see § 39, *supra*.

<sup>4</sup> *Barry v. Edmunds*, 116 U. S. 550; *Deputron v. Young*, 116 U. S. 241, 252.

<sup>5</sup> *Deputron v. Young*, 184 U. S. 241, 251. See *La Vega v. Lapsley*, 1

*Woods*, 428; *Fuller v. Metropolitan L. Ins. Co.*, 81 Fed. Rep. 696.

<sup>6</sup> *Thompson v. Railroad Companies*, 6 Wall. 184; *Kendig v. Dean*, 97 U. S. 428; *Williams v. Nottawa*, 104 U. S. 209; *Van Norden v. Morton*, 99 U. S. 378. And see, generally, *Richards v. Allis (Wis.)*, 52 N. W. Rep. 598; *Clarke v. Sawyer*, 2 Barb. Ch. 411; *Ledsinger v. Central Line*, 79 Ga. 716; s. c., 5 S. E. Rep. 197; *Gaylord v. Kelshaw*, 1 Wall. 81. Unqualified dismissal may on appeal be remanded for correction. *Rogers v. Durant*, 106 U. S. 644. In Illinois, contrary to the regular practice in chancery, an objection to the jurisdiction, if apparent on the face of the bill, may be taken by motion to dismiss. *Vieley v. Thompson*, 44 Ill. 9; *Emerson v. Western Union R. Co.*, 75 Ill. 176; *Clark v. Ewing*, 93 Ill. 572; *State Bank v. Stanton*, 2 Gilm. 352; *Harris v. Galbraith*, 43 Ill.

**§ 469. Compelling complainant to elect.**—The eighteenth order of Lord Bacon provided as follows:—“Double vexation is not to be admitted; but if the party sue for the same cause at common law and in chancery he is to have a day given him to make his election where he will proceed, and in default of such election to be dismissed.”<sup>1</sup> Under this order it has become the practice of the court, where the plaintiff is suing the defendant both at law and in equity at the same time for the same matter, to require him, upon the application of the defendant, to elect whether he will proceed with the suit in equity or with the action at law.<sup>2</sup> The suits must be substantially for the same subject-matter,<sup>3</sup> and brought by the same parties or in the same right,<sup>4</sup> and where a recovery in one

309; *Parker v. Parker*, 61 Ill. 369. See, also, *Parker v. Porter*, 4 Yerg. (Tenn.) 81.

<sup>1</sup> Beames' Ord. in Ch. 11.

<sup>2</sup> *Franklin v. Hersch*, 8 Tenn. Ch. 467; *Bradford v. Williams*, 2 Md. Ch. 1, where the subject is discussed in elaborate opinions; *Houston v. Sadler*, 4 Stew. & Port. (Ala.) 180; *Semmes v. Mott*, 27 Ga. 92. The power belongs solely to courts of chancery, not to courts of law. *Dunlap v. Newman*, 52 Ala. 178; *P. & M. Bank v. Willis*, 5 Ala. 770; *P. & M. Bank v. Walker*, 7 Ala. 926; *Kemp v. Cox*, 14 Ala. 614; *State Bank v. Wilson*, 9 Ill. 57; *Eager v. Price*, 2 Paige, 384. The case of a mortgagor is an exception; he may pursue all his remedies concurrently. *Booth v. Booth*, 2 Atk. 348; *Schools v. Sall*, 1 Sch. & Lef. 176; *Hughes v. Edwards*, 4 Wheat. 494; *Dunkley v. Van Buren*, 8 Johns. Ch. 380; *Perry v. Barker*, 18 Ves. 205. But see *Franklin v. Hersch*, 8 Tenn. Ch. 467; *Carwick v. Young*, 2 Swanst. 248; *Barker v. Smark*, 8 Beav. 64. Both suits need not be in a domestic court. *Central R. Co. v. New Jersey R. Co.*, 32 N. J. Eq. 67; *Leicester v. Leicester*, 10 Sim. 87.

<sup>3</sup> See a valuable note by the learned

reporter in 32 N. J. Eq. 67 (*Central R. Co. v. New Jersey & Co. R. Co.*), citing *Carlisle v. Cooper*, 18 N. J. Eq. 241; *Macy v. Childress*, 2 Tenn. Ch. 28; *Rattenbury v. Fenton*, Coop. temp. Brough. 60; *McEwen v. Broadhead*, 11 N. J. Eq. 181; *Davison v. Johnson*, 16 N. J. Eq. 112; *Ballou v. Ballou*, 26 Vt. 678; *Calaveras Co. v. Brockway*, 30 Cal. 325; *Bradford v. Williams*, 2 Md. Ch. 1; *Ex parte Alabama G. L. Ins. Co.*, 59 Ala. 192; *Sullings v. Goodyear Co.*, 36 Mich. 813; *McRae v. Singleton*, 35 Ala. 297; *Flint v. Sparr*, 17 B. Mon. 518.

<sup>4</sup> *Central R. Co. v. New Jersey & Co. R. Co.*, 32 N. J. Eq. 67, note, citing *Higgins v. York Co.*, 2 Atk. 44; *Henry v. Goldney*, 15 M. & W. 494; *Nunn v. Lomer*, 18 Jur. 286; *Wise v. Browne*, 9 Price, 398; *Sowter v. Dunston*, 1 Mann. & Ry. 508; *Fulton v. Golden*, 25 N. J. Eq. 853; *Botts v. Cozine*, 2 Edw. Ch. 588; *Walsworth v. Johnson*, 41 Cal. 61; *Beach v. Norton*, 8 Day, 71; *Cole v. Butler*, 43 Me. 401; *Stern's Case*, 14 Ala. 597; *Adams v. Gardiner*, 13 B. Mon. 197; *Atkinson v. State Bank*, 5 Blackf. 84; *Dawson v. Vaughn*, 42 Ind. 395; *O'Conner v. Blake*, 29 Cal. 312; *Fisk v. Union Pac. R. Co.*, 8 Blatchf. 299; *Davis v. Hunt*,

would be a bar to a judgment or decree in the other.<sup>1</sup> The complainant may be put to a special election whether to proceed partly at law and partly in equity.<sup>2</sup>

§ 470. **The same subject continued.**—Where a party is complainant in equity and defendant (upon the same matter) at law, he cannot be compelled to make his election; it is not as if he were complainant in both courts.<sup>3</sup> Where another suit is pending for the same cause in a court of law, the complainant will not be put to his election, unless the remedy afforded in the suit at law is co-extensive and equally beneficial with the remedy in equity.<sup>4</sup> After an election to proceed in the chancery suit the complainant cannot object to the jurisdiction.<sup>5</sup> Before the court will compel an election the defendant must file a sufficient answer, so that the complainant may be enabled to make a judicious choice; and the time for excepting to the answer must have expired.<sup>6</sup> The defendant may then proceed by motion or petition.<sup>7</sup> Where a com-

<sup>2</sup> *Bail*, 412; *Paul v. Hurlbert*, 5 Rep. 788; *Osborn v. Cloud*, 23 Iowa, 104; *Chase v. Bank*, 56 Pa. St. 355; *New England Screw Co. v. Bliven*, 8 Blatchf. 240. See *Graves v. Dale*, 1 Mon. 190; *McConnell v. Stettinius*, 7 Ill. 707; *Thomas v. Freelove*, 17 Vt. 188; *Blackburn v. Watson*, 85 Pa. St. 241; *Parsons v. Greenville Co.*, 1 Hughes, 279. But it is no objection that another person is the nominal plaintiff in the action at law. *Soule v. Corning*, 11 Paige, 412. Identity of subject-matter and relief is paramount to diversity of parties. *Central R. Co. v. New Jersey R. Co.*, 32 N. J. Eq. 67.

<sup>1</sup> *Laraussin v. Carquette*, 24 Miss. 151.

<sup>2</sup> *Franklin v. Hersch*, 8 Tenn. Ch. 467; *Anon.*, 1 Vern. 104; *Barker v. Dumaresque*, 2 Atk. 119.

<sup>3</sup> *Botts v. Cozine*, 2 Edw. Ch. 582.

<sup>4</sup> *Way v. Bragaw*, 16 N. J. Eq. 214; *Law v. Rigby*, 4 Bro. C. C. 68; *Pickford v. Hunter*, 5 Sim. 122.

<sup>5</sup> *McBroom v. Wiley*, 2 Heisk. 58; *Mortimer v. Soares*, 1 El. & El. 399; *Hamson v. Hamson*, 39 Ala. 489. Where a suit was commenced in a court of chancery in consequence of an inequitable defense interposed to a suit at law for the same cause of action, a motion by the defendant that the complainant elect in which suit he would proceed was denied with costs, it appearing that no attempt was being made to prosecute the suit at law. *Thompson v. Graham*, 1 Paige, 452.

<sup>6</sup> *Dunlap v. Newman*, 52 Ala. 178; 1 Smith's Ch. Pr. 561; *Semmes v. Mott*, 27 Ga. 92; *Conover v. Conover*, 1 N. J. Eq. 408, 409; *Soule v. Corning*, 11 Paige, 412; *Leicester v. Leicester*, 10 Sim. 87, 89; *Fisher v. Nee*, 3 Mer. 45, 47.

<sup>7</sup> *Freeman v. Staats*, 8 N. J. Eq. 814. One of several defendants may call for such election. *Central R. Co. v. New Jersey & Co. R. Co.*, 32 N. J. Eq. 67; *Bradford v. Williams*, 2 Md. Ch. 1.

plainant is put to his election and elects to proceed at law, the bill will be dismissed with costs; but if he elects to proceed in chancery, he will be enjoined from taking any step at law without the leave of the court.<sup>1</sup> The dismissal of the bill pursuant to an election is not a bar to another suit.<sup>2</sup>

It seems that the motion must be made in the suit last brought. *Ratzer v. Ratzer*, 2 Abb. N. C. 461; *Nicholl v. Mason*, 21 Wend. 339; *Bank of U. S. v. Merchants' Bank*, 7 Gill, 415; *Sherwood v. Hammond*, 4 Blackf. 504; *Renner v. Marshall*, 1 Wheat. 215; *Haight v. Holly*, 3 Wend. 258. See *Morton v. Webb*, 7 Vt. 123; *Williamson v. Paxton*, 18 Gratt. 475. And is not of course, but made to the court. *Rogers v. Vosburgh*, 4 Johns. Ch. 84; *Franklin v. Hersch*, 3 Tenn. Ch. 467. As to waiver of an election, see *Welchel v. Thompson*, 39 Ga. 559; *Wasburn v. Great West. Ins. Co.*, 114 Mass. 175; *Kittredge v. Race*, 92 U. S. 116.

<sup>1</sup> *Rogers v. Vosburgh*, 4 Johns. Ch. 84; *Jones v. Earl of Strafford*, 3 P. Wms. 79, 90. The order must allow a reasonable time to elect. *Bracken v. Martin*, 3 Yerg. (Tenn.) 55. In *Central R. Co. v. New Jersey &c. R. Co.*, 32 N. J. Eq. 67, 74, it was ordered that complainants elect within eight

days after service of the order. The court said:—"Such is the practice. If they elect to proceed in the federal court, the bill in this suit will be dismissed as to them with costs; and if they elect to proceed here, they will be required to dismiss their bill in the federal court as a condition precedent to so doing." If the complainant requires further time he should apply by motion on notice. 1 Daniell's Ch. Pr. (5th ed.) 817. As to motion to discharge the order and proceedings thereon, see *Mouseley v. Basnett*, 1 Ves. & B. 382, n.; *Anon.*, 2 Madd. 395; *Mills v. Fry*, 3 Ves. & B. 9; *Carweck v. Young*, 2 Swanst. 289; *Amory v. Brodrick*, Jacob, 580. The election should be in writing signed by the complainant or his solicitor and filed in the clerk's office. 1 Daniell's Ch. Pr. (5th ed.) 817.

<sup>2</sup> *Countess of Plymouth v. Bladon*, 2 Vern. 32; *Livingston v. Kane*, 4 Johns. Ch. 224; *Rogers v. Vosburgh*, 3 Johns. Ch. 84.



## CHAPTER XIV.

### REPLICATIONS.

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| <p>§ 471. Nature and office of replications.</p> <p>472. Disuse of special replications.</p> <p>473. Effect of filing a special replication.</p> <p>474. Replication to an answer.</p> <p>475. Replication to a plea.</p> | <p>§ 476. Waiver of a replication.</p> <p>477. Withdrawal of a replication.</p> <p>478. Time for filing a replication.</p> <p>479. Amendments and replications <i>nunc pro tunc</i>.</p> <p>480. Frame of a replication.</p> |
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§ 471. Nature and office of replications.—According to the original system of equity pleading replications were either general or special. The former consists of a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill.<sup>1</sup> A special replication was occasioned by the defendant's introducing new matter into his plea or answer, which made it necessary for the plaintiff to put in issue some additional fact on his part in avoidance of such new matter.<sup>2</sup> Special replications have been long disused and are not now permitted,<sup>3</sup> and

<sup>1</sup> Story's Equity Pleading (10th ed.), § 878. See, also, Langdell's Equity Pleading (2d ed.), § 85 *et seq.* The answer of the complainant to defendant's cross-bill may in some cases be considered as substantially, and for all practical purposes, a replication to the defendant's answer to the original bill. *Whyte v. Arthur*, 17 N. J. Eq. 521. The mere filing of a replication is not a compliance with a rule to speed the cause. *West v. Paige*, 9 N. J. Eq. 208. A complainant is not bound to reply to an answer which, though filed, has not been entered on the order book. *Johnson v. Harrison*, 6 Litt. 226. No replication is necessary where the de-

fendant's answer admits the plaintiff's case, or sufficient to enable him to go to a hearing without the examination of witnesses. Story's Equity Pleading (10th ed.), § 877. The complainant ought not to reply to a general disclaimer to the whole bill. § 291, *supra*.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 878. It contained no prayer for relief unless by reference to the prayer in the bill. Langdell's Equity Pleading (2d ed.), § 85.

<sup>3</sup> *McClane v. Shepherd*, 21 N. J. Eq. 76; Story's Equity Pleading (10th ed.), § 879. See, also, the following section.

the English practice of serving upon the defendant a subpoena to rejoin and of filing a rejoinder has never obtained in this country.<sup>1</sup>

**§ 472. Disuse of special replications.**—The use of special replications has been discontinued, and if a complainant desires to avoid the effect of matter pleaded in bar, he must apply to amend the charging part of his bill. This charging part, containing the alleged pretenses of a defendant and the complainant's denial of them, amounts virtually to a special replication.<sup>2</sup> Thus, where the defendant pleaded a release, the complainant was permitted to amend his bill by alleging that the release was fraudulent.<sup>3</sup> So upon replication to a plea of the statute of limitations, an agreement not to take advantage of the statute cannot be given in evidence. The promise should be alleged in the bill, and if omitted by inadvertence the complainant may amend.<sup>4</sup>

**§ 473. Effect of filing a special replication.**—If a special replication is filed, it can at most be treated only as a general replication.<sup>5</sup> The defendant is not bound to notice new matter set up in the replication, nor is he affected by it.<sup>6</sup> A special replication which sets up in reply to a plea new matter and matter accruing since the filing of the bill will be stricken out on motion,<sup>7</sup> or a decree thereon may be reversed.<sup>8</sup>

<sup>1</sup> Story's Equity Pleading (10th ed.), § 879, note 4. United States Equity Rule 66 provides that "in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue without any rejoinder or other pleading on either side."

<sup>2</sup> Storms v. Storms, 1 Edw. Ch. 858. United States Equity Rule 45 provides that "no special replication to an answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a

judge thereof may in his discretion direct." See, also, Mason v. Hartford & Co. R. Co., 10 Fed. Rep. 884, as to special replication to pleas.

<sup>3</sup> McClane v. Shepherd, 21 N. J. Eq. 76, allowing motion upon payment of costs.

<sup>4</sup> Cowart v. Perrine, 21 N. J. Eq. 101.

<sup>5</sup> Shaeffer v. Weed, 8 Gilm. (Ill.) 511.

<sup>6</sup> Roundtree v. Gordon, 8 Mo. 19; Mills v. Pittman, 1 Paige, 490.

<sup>7</sup> Mason v. Hartford & Co. R. Co., 10 Fed. Rep. 884. See, also, Storms v. Storms, 1 Edw. Ch. 858.

<sup>8</sup> Vattier v. Hinde, 7 Peters, 258.

§ 474. **Replication to an answer.**—A general replication is an averment of the truth and sufficiency of the complainant's bill, and a general denial of the same properties in the answer of the defendant.<sup>1</sup> Where a deed is set up in an answer, together with the facts on which its validity depends, the general replication puts the validity of the deed in issue, and it may be impeached although not questioned by the bill.<sup>2</sup> The general replication admits the sufficiency of the answer as a discovery,<sup>3</sup> and is a waiver of any mere technical objection to the form in which the defenses are presented,<sup>4</sup> but it does not cure defects of substance in the answer.<sup>5</sup>

§ 475. **Replication to a plea.**—A general replication to a plea denies its truth but admits its legal sufficiency.<sup>6</sup> Upon proof of the facts alleged in the plea, the dismissal of the bill at the hearing is a matter of course.<sup>7</sup> A United States equity rule introduces a qualification by providing that "if upon an

<sup>1</sup>Hoffman's Ch. Pr. (2d ed.) 451; Barton's Suits in Equity, 142, n.; Story's Equity Pleading (10th ed.), § 877; Glenn v. Hebb, 12 Gill & J. 271; O'Hare v. Downing, 180 Mass. 16. It is equivalent to a plea of not guilty in a criminal prosecution. Anon., Hopk. Ch. 27. And every allegation of the answer which is not directly responsive, but sets forth matter in avoidance or bar, is denied by the general replication and must be proved *aliunde*. Lovett v. Demarest, 5 N. J. Eq. 118; Humes v. Scruggs, 94 U. S. 22. See §§ 867, 868, *supra*. But it does not affect admissions contained in the answer of allegations in the bill. Cavender v. Cavender, 114 U. S. 464.

<sup>2</sup>Boyd v. Hawkins, 2 Dev. (N. C.) Eq. 195.

<sup>3</sup>Story's Equity Pleading (10th ed.), § 877; Hughes v. Blake, 6 Wheat. 453.

<sup>4</sup>McKim v. White Hall Co., 2 Md. Ch. 510.

<sup>5</sup>Everts v. Agnes, 4 Wis. 848.

<sup>6</sup>Burrell v. Hackley, 35 Fed. Rep. 883; Hughes v. Blake, 6 Wheat. 453;

Cottle v. Krementz, 25 Fed. Rep. 494; Seebold v. Lockner, 30 Md. 183.

<sup>7</sup>Hughes v. Blake, 6 Wheat. 453. See, also, § 329, n. 5, *supra*. "Upon a replication to a plea nothing is in issue except what is distinctly averred in the plea, and if that is established at the hearing the plea is an absolute bar, not merely to that part of the claim to which it is strictly pertinent, but to so much of the bill as it professes to cover. And if the truth of the plea be made out, the bill must be dismissed, although the matters pleaded contain, in fact, no valid defense to the suit." Sandford, V. C., in Tompkins v. Anthon, 4 Sand. Ch. 97, 120. Where the plaintiff's replication was only to "the answers" of the three defendants, and not to their pleas, although each of them had filed a plea, and the only answers in the case were those filed by two of them in support of their pleas, and no proofs were taken, and the case was set down for hearing upon the bill and pleas, the facts alleged by the defendants in

issue the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.”<sup>1</sup>

**§ 476. Waiver of a replication.**—Where parties willingly go to trial without the issues being made up by the filing of a replication and the cause is heard upon evidence, they will be deemed to have waived the formality of such an issue.<sup>2</sup> And so where the cause is submitted by agreement upon bill, answer and general replication and no replication is in fact filed;<sup>3</sup> and where the complainant failed to serve his replication on the defendant but the latter attended and cross-examined witnesses.<sup>4</sup>

**§ 477. Withdrawal of a replication.**—If a complainant by mistake files a replication to an irregular answer he may be permitted to withdraw the same and to move to take the an

their pleas are admitted to be true. But if the replication were treated as taking issue on the pleas as well as on the answers, and the case was submitted upon the bill, pleas, answers and replication, the facts relied upon by defendants were proven by the sworn answer, so far as they were responsive to the bill, where the plaintiff gave no evidence. *Beals v. Illinois & C. R. Co.*, 188 U. S. 290.

<sup>1</sup> Equity Rule 88. As to the effect of this rule see § 829, *supra*, and *Matthews v. Lalance & G. Mfg. Co.*, 2 Fed. Rep. 232. *Cf.* *Cottle v. Krementz*, 25 Fed. Rep. 494; *Myers v. Dorr*, 13 Blatchf. 22; *Theberath v. Rubber & C. Co.*, 5 Bann. & A. 584.

<sup>2</sup> *Corbus v. Teed*, 69 Ill. 206, holding that the answer will then have no greater effect than if a replication had not been filed; *Holt v. Weld*, 140 Mass. 578; *Jameson v. Conway*, 10 Ill. 227, 229. See, also, *Scott v. Clarkson*, 1 Bibb, 277; *Jones v. Neely*, 72 Ill. 449; *Chambers v. Rowe*, 86 Ill. 171; *Webb v. Alton & C. Ins. Co.*, 10

Ill. 228; *Stark v. Hillibert*, 19 Ill. 844; *Central Bank v. Conn. Mut. L. Ins. Co.*, 104 U. S. 54; *Demaree v. Driskill*, 8 Blatchf. 115; *Jones v. Brittan*, 1 Woods, 667; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405; *Clements v. Moore*, 6 Wall. 299; *Fischer v. Hayes*, 6 Fed. Rep. 76; *Fritz v. Stover*, 22 Wall. 198. In *Dascomb v. Marston*, 80 Me. 228; s. c., 18 Atl. Rep. 888, the complainant, after replication, was allowed to set the cause down for hearing on bill and answer, and the replication was held to be waived. So in *Wiser v. Blachly*, 1 Johns. Ch. 607, a similar case, where the cause was set down for hearing without any rule to produce witnesses and the defendant had the benefit of his answer as if it were heard on bill and answer. See *Corbus v. Teed*, *supra*; § 868, *supra*.

<sup>3</sup> *Glenn v. Hebb*, 12 Gill & J. 271.

<sup>4</sup> *Brooks v. Mead*, Walk. Ch. (Mich.) 88. See, also, *Hall v. Clagett*, 48 Md. 223; *Maryland & C. I. Co. v. Wingert*, 8 Gill, 178.

swer from the files.<sup>1</sup> Where the plaintiff wishes to withdraw his replication merely for the purpose of setting the cause down for a hearing on the bill and answer, it seems the motion will be granted much as of course.<sup>2</sup> Leave to withdraw the replication for the purpose of excepting to the answer is not allowed unless for special cause clearly shown and satisfactorily accounting for the neglect of the plaintiff.<sup>3</sup>

§ 478. **Time for filing a replication.**—The United States equity rules provide that the plaintiff may set down the plea to be argued, “or he may take issue on the plea.”<sup>4</sup> If he does neither “on the rule-day when the plea is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.”<sup>5</sup> By setting the plea down for argument the plaintiff does not make such a conclusive election that if the plea is sustained he cannot afterwards take issue on it.<sup>6</sup> “Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter. . . . If the plaintiff shall omit or refuse to file such replication within the prescribed time, the defendant shall be entitled to an order as of course<sup>7</sup> for a dismissal of the suit; and the suit shall there-

<sup>1</sup> *American Ins. Co. v. Bayard*, 8 Barb. Ch. 610.

<sup>2</sup> *Brown v. Ricketts*, 2 Johns. Ch. 425. See, also, *Rogers v. Goore*, 17 Ves. 180.

<sup>3</sup> Where three months had elapsed from the time of filing the answer and no good cause was shown for the delay, the application was refused. *Brown v. Ricketts*, 2 Johns. Ch. 425, holding also that a replication cannot be withdrawn for the purpose of amending the bill unless the plaintiff shows the materiality of the amendments and why the matter proposed to be introduced as amendment was not before stated in the bill.

<sup>4</sup> Equity Rule 88.

<sup>5</sup> Equity Rule 88.

<sup>6</sup> *United States v. Dalles Military Road Co.*, 140 U. S. 681; s. c., 11 S. Ct. Rep. 988. See, also, s. c. (C. C. A.), 51 Fed. Rep. 620.

<sup>7</sup> *Robinson v. Satterlee*, 3 Sawy. 184. Where a defendant served with subpoena entered his appearance and filed his answer before the rule-day at which the writ was returnable, it was held that under the equity rules such practice was proper, and that the replication should be filed on or before the rule-day succeeding that on which the writ was returnable. *Heyman v. Ahlman*, 34 Fed. Rep. 686.

upon stand dismissed, unless the court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause and to such other terms as may be directed.”<sup>1</sup>

**§ 479. Amendments and replications *nunc pro tunc*.—**Any error in the replication, except the omission of the names of any defendants, may be corrected by amendment.<sup>2</sup> A replication is considered as a mere formal pleading, and if the complainant has omitted to file one at the proper time, the court will allow it to be done afterwards *nunc pro tunc*.<sup>3</sup> This has been permitted after the examination of witnesses, and even after a cause has come on for hearing and the reading of proofs has commenced.<sup>4</sup> And the like permission has been granted after the cause has been set down for hearing and a reference ordered.<sup>5</sup> After a case has been set down for a hearing on the bill and answer, and a hearing had on the question of jurisdiction, the court may allow the filing of a repli-

<sup>1</sup> Equity Rule 66. The answer of every defendant must be replied to without reference to the state of the cause or of the pleadings in regard to any other defendant. *Coleman v. Martin*, 6 Blatchf. 291; *Desty's Federal Procedure* (8th ed.), p. 1177. When a motion to strike an answer from the files is pending, the suit will not be dismissed for want of a replication. *Allis v. Stowell*, 10 Biss. 57; s. c., 5 Fed. Rep. 208. In case of amendment to a bill the complainant may reply to the answer within the usual time after the amended bill is deemed to be fully answered, unless the court, in the order allowing him to amend, has deprived him of that right. *Trust & Ins. Co. v. Jenkins*, 8 Paige, 589. Where the complainant amends after answer put in, it is irregular to file a replication to the first answer before the time for answering the amendments has expired; although the complainant waives the necessity of an

answer to the amendment. *Richardson v. Richardson*, 5 Paige, 58.

<sup>2</sup> 1 Daniell's Ch. Pr. (5th ed.) 831. See, also, *Jameson v. Conway*, 10 Ill. 227, 229.

<sup>3</sup> 1 Barbour's Ch. Pr. (2d ed.) 252; *Jameson v. Conway*, 10 Ill. 227, 229. See, also, *Fischer v. Hayes*, 6 Fed. Rep. 76; s. c., 19 Blatchf. 26; *Jones v. Britton*, 1 Woods, 567.

<sup>4</sup> Cooper's Eq. Pl. 331, 335; *Rodney v. Hare*, Mosely, 296; *Armistead v. Bozman*, 1 Ired. (N. C.) Eq. 117. See *Warren v. Twilley*, 10 Md. 89; *Bullinger v. Mackey*, 14 Blatchf. 835; *Hall v. Clagett*, 48 Md. 228.

<sup>5</sup> *Smith v. West*, 8 Johns. Ch. 865 (allowed on payment of costs); *Pierce v. West*, Peters (C. C.), 851; *Scott v. Clarkson*, 1 Bibb, 277. See *Warren v. Twilley*, 10 Md. 89. Where the replication was defective by reason of the transposition of parties therein, the court permitted a proper one to be filed after the cause had been submitted to the jury. *Buckley v. Boutilier*, 69 Ill. 298.

cation.<sup>1</sup> In deciding whether a complainant may be allowed to file a replication after the ordinary time has passed, the court will not consider the merits of the cause.<sup>2</sup>

**§ 480. Frame of a replication.**—The form of a general replication is as follows:—“This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith that he doth and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.”<sup>3</sup> Replications are prepared and signed by the solicitor and do not require the signature of counsel.<sup>4</sup> The full title of the cause as it stands at the time the replication is filed must be set forth in the heading of the replication, but only the names of such of the defendants as have appeared should be inserted or referred to in the body.<sup>5</sup> If a defendant's name has been misspelled by the plaintiff, and such defendant has corrected the same by his answer, but the plaintiff has not afterwards amended his bill with respect to such name, the correction should be shown in the title to the replication.<sup>6</sup> Where any defendant has died since the bill was filed, the words “since deceased” should follow his name in the title, but his name should be omitted in the body of the replication. If the

<sup>1</sup> *Doody v. Pierce*, 9 Allen, 141.

§ 881; 1 Daniell's Ch. Pr. (5th ed.)

<sup>2</sup> *La Roque v. Davis*, 2 Edw. Ch. 592.

831; 1 Barbour's Ch. Pr. (2d ed.) 250.

<sup>3</sup> *Barton's Suit in Equity*, 144, 145; *Story's Equity Pleading* (10th ed.), § 878, p. 743, n. 2.

<sup>4</sup> 1 Daniell's Ch. Pr. (5th ed.) 830.

<sup>5</sup> Thus: — “John Jones (in the bill called William Jones).” 1 Daniell's

<sup>6</sup> *Story's Equity Pleading* (10th ed.), Ch. Pr. (5th ed.) 830 and n. 8.



plaintiff joins issue with all the defendants, their names need not be repeated in the body; it is sufficient in such case to designate them as "all the defendants;" but, if he does not join issue with all, the names of the defendants must be set out in the body. The names of those defendants who are stated in the bill to be out of the jurisdiction must be inserted in the title but not in the body.<sup>1</sup> A replication like all other papers in equity should contain no scandal or impertinence.<sup>2</sup>

<sup>1</sup>1 Daniell's Ch. Pr. (5th. ed.) 880, 881.

<sup>2</sup>1 Foster's Federal Practice (2d ed.), § 159.

## CHAPTER XV.

### ABATEMENT, REVIVOR AND SUPPLEMENT.

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| <p>§ 481. Abatement of a suit.<br/>482. Effect of an abatement.<br/>483. Method of revivor.<br/>484. Title to revive.<br/>485. Revivor by the defendant or his representative.<br/>486. Frame of a bill of revivor.<br/>487. Subpoena upon a bill of revivor.<br/>488. Pleadings and proceedings upon a bill of revivor.<br/>489. What renders a suit defective.<br/>490. General nature of supplemental bills.<br/>491. Petition instead of supplemental bill.<br/>492. Supplemental bill not a substitute for amendments.<br/>493. Use of supplemental bills illustrated.<br/>494. The same subject continued.<br/>495. Making a new case by supplemental bill.<br/>496. The same subject continued.<br/>497. Supplemental bills inconsistent with original.<br/>498. Retaining original bills to permit supplemental bills.<br/>499. Title of complainant in a supplemental bill.</p> | <p>§ 500. Leave to file a supplemental bill.<br/>501. Application for leave.<br/>502. The same subject continued — Hearing on petition — Exercise of discretion.<br/>503. Discretion of the court not reviewable.<br/>504. Effect of filing without leave.<br/>505. Frame of a supplemental bill.<br/>506. Parties to a supplemental bill.<br/>507. Process upon supplemental bills.<br/>508. Proceedings on supplemental bills — Demurrers and pleas.<br/>509. The same subject continued — Answer.<br/>510. The same subject continued — Replication and evidence.<br/>511. Original bills in the nature of supplemental bills.<br/>512. The same subject continued — Frame of the bill.<br/>513. Original bill in the nature of a bill of revivor.<br/>514. The same subject continued — Frame of bill — Proceedings.<br/>515. Bill of revivor and supplement.</p> |
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§ 481. Abatement of a suit.— If any event happens after the filing of a bill in equity which makes it necessary to bring in a new party, either plaintiff or defendant, in order to obtain a complete or satisfactory determination of the controversy, the suit will either abate or become defective. The abatement or defect must be remedied by the filing of a bill of revivor, a bill in the nature of a bill of revivor, a supple-

mental bill, a bill in the nature of a supplemental bill, or a bill of revivor and supplement.<sup>1</sup> In general upon the death of a plaintiff or of a defendant materially interested the suit abates.<sup>2</sup> If, however, the whole interest or liability of the party dying, be he plaintiff or defendant, survives to or devolves upon other parties to the suit, no abatement takes place;<sup>3</sup> and likewise where the interest of the party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest (which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible upon a contingency), the suit does not so abate as to require any proceeding to warrant the prosecution of the suit against the remaining parties;<sup>4</sup> and if the plaintiff in a bill of interpleader should die after a decree that the defendants interplead there will be no abatement of the suit;<sup>5</sup> and in a suit by or against an officer in his official capacity the death of the officer works no abatement, and the successor for the time being becomes the party.<sup>6</sup> The coming of age of an infant party does not abate the suit; nor does it render the suit defective so as to require a supplemental bill, unless his

<sup>1</sup> 1 Foster's Federal Practice (2d ed.), § 174; Mitford's Eq. Pl., ch. 1, § 8. See, also, Story's Equity Pleading (10th ed.), § 326 *et seq.*

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1507; Story's Equity Pleading (10th ed.), § 854. The dissolution of a corporation produces the same result in a suit by or against it. 2 Foster's Federal Practice (2d ed.), § 174, citing *National Bank v. Colby*, 21 Wall. 609; *Greeley v. Smith*, 8 Story, 658; *Mumma v. Potomac Co.*, 8 Pet. 281 (but see *Lake Superior Iron Co. v. Brown, Bonnell & Co.*, 44 Fed. Rep. 529); *Hemingway v. Stansell*, 106 U. S. 899; *Grantland v. Memphis*, 12 Fed. Rep. 287; and as to consolidation of two corporations, *Edison E. L. B. v. Westinghouse*, 84 Fed. Rep. 282. A suit by a husband and wife for the specific performance of an agreement to convey real estate to

the wife abates upon the death of the latter. *Hand v. Jacobus*, 19 N. J. Eq. 79.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1511; *Gilchrist v. Cannon*, 1 Cold. 581. The death of one of several complainants in a creditor's bill does not effect an abatement. Story's Equity Pleading (10th ed.), § 357.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 856. But if such party be the sole plaintiff or defendant there is necessarily an end to the suit under the circumstances stated.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 862.

<sup>6</sup> *Felts v. Mayor of Memphis*, 2 Head, 650; *Dawson v. Clark*, 8 Sneed, 488; *Hardee v. Gibbs*, 50 Miss. 802; *McDuff v. Beauchamp*, 50 Miss. 531. See *Winthrop v. Farrar*, 11 Allen, 898.

interest in the subject of the suit is changed by that event.<sup>1</sup> A suit abates by the marriage of a female plaintiff,<sup>2</sup> unless before revivor her husband dies, in which case a bill of revivor becomes unnecessary; but the subsequent proceedings should be in the name and with the description which she acquired by the marriage.<sup>3</sup> Upon the marriage of a female defendant the suit does not abate, although her husband ought to be named in the subsequent proceedings.<sup>4</sup>

**§ 482. Effect of an abatement.**—The abatement of a suit in equity is merely an interruption to the suit, suspending its progress until new parties are brought before the court.<sup>5</sup> In general no proceedings can be had in a cause during an abatement, except for a revivor, or to prevent injury to the surviving parties where those entitled omit to revive.<sup>6</sup> But proceedings may be had to preserve the property in dispute,<sup>7</sup> or to punish a party for breach of an injunction,<sup>8</sup> or to set

<sup>1</sup> *Campbell v. Bowne*, 5 Paige, 34.

<sup>2</sup> *Story's Equity Pleading* (10th ed.), § 854; *Quackenbush v. Leonard*, 10 Paige, 181. See, however, *Lorillard v. Standard Oil Co.*, 2 Fed. Rep. 902.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 861. The marriage of a male defendant in a partition suit does not abate it. *Clark v. Hall*, 7 Paige, 886.

<sup>4</sup> *Story's Equity Pleading* (10th ed.), § 854; *Quackenbush v. Leonard*, 10 Paige, 181.

<sup>5</sup> *Hoxie v. Carr*, 1 Sumner, 178, 178. See, also, *Story's Equity Pleading*, § 854; *Mellus v. Thompson*, 1 Cliff. 125, 129.

<sup>6</sup> *Hoffman's Ch. Pr.* (2d ed.) 889; *Griswold v. Hill*, 1 Paine, 488. There is a distinction between the action of the court in the cause and the action of the court *beyond* the cause, the latter term applying to measures which are necessary for the execution of a decree which has been pronounced, and without respect to the relief to which the party was primarily entitled upon the merits of the case. The distinction is pointed out

by Baldwin, J., in *Cocke v. Gilpin*, 1 Rob. 28. And in *Crislip v. Cain*, 19 West Va. 438, 458, it was held that the death of a party would not suspend proceedings by rule to compel payment by the purchaser of land sold under a decree. So where after a decree for foreclosure and sale the defendant dies, a sale may be made without a revivor. *Whiting v. Bank of U. S.*, 13 Pet. 6. But *cf.* *Appold v. Building Ass'n*, 37 Md. 457.

<sup>7</sup> *Washington Ins. Co. v. Slee*, 3 Paige, 868.

<sup>8</sup> *Hawley v. Bennett*, 4 Paige, 168. But where the suit abates by the death of either of the parties pending an injunction, the defendant or his representatives may have an order that the complainant or his representatives revive within a reasonable time or that the injunction be dissolved. *Leggett v. Dubois*, 3 Paige, 211, where sixty days was the time fixed; *White v. Fitzhugh*, 1 Hen. & M. 1. See, also, *Chowick v. Dimes*, 8 Beav. 290, 292, 293; *Chester v. Life Ass'n &c.*, 4 Fed. Rep. 487. This does

aside proceedings in the master's office.<sup>1</sup> If depositions are taken pending an abatement, but the abatement was not known when the commission issued, they may be read.<sup>2</sup> Money may be paid out of court when the right is clear, during an abatement,<sup>3</sup> or upon consent of parties.<sup>4</sup> The court will also, pending an abatement, make an order for the delivery of deeds and writings brought into court, or it will send it to a master to inquire to whom they belong.<sup>5</sup> If a bill is retained, and an action directed against one of the defendants to try the right, and a material defendant dies before trial, the trial may proceed without a revivor, unless the decree has directed the deceased defendant to attend it.<sup>6</sup> A receiver will not be discharged on an abatement of the suit without a special order of the court. An order dismissing a bill for want of prosecution, made pending an abatement, will be irregular.<sup>7</sup> If pending a total abatement process of contempt is issued, it will be irregular and may be discharged on motion with costs.<sup>8</sup> The statute of limitations will run pending an abatement in all cases except a decree to account.<sup>9</sup> Where a suit abates by the death of a party after the argument, the decree of the court may be pronounced, notwithstanding, but should in such case be entered *nunc pro tunc* as of the time of the argument.<sup>10</sup>

§ 483. Method of revivor.—In the absence of statutory regulations the usual mode of reviving and continuing the proceedings whenever there is an abatement of the suit be-

not apply to injunctions made perpetual by decree. See *Askew v. Townsend*, 2 Dick. 471.

<sup>1</sup>*Quackenbush v. Leonard*, 10 Paige, 181.

<sup>2</sup>*Washington Ins. Co. v. Slee*, 2 Paige, 368; *Sinclair v. James*, 1 Dick. 277; *Thompson v. Took*, 1 Dick. 115; *Peters v. Robinson*, 1 Dick. 117.

<sup>3</sup>*Roundell v. Curren*, 6 Ves. 250. See, also, *Finch v. Lord Winchelsea*,

1 Eq. Ab. 2.

<sup>4</sup>*Beard v. Powis*, 2 Ves. Sr. 392.

<sup>5</sup>*Wharam v. Broughton*, 1 Ves. 185.

<sup>6</sup>*Humphreys v. Hollis*, Jac. 78.

<sup>7</sup>*Canham v. Vincent*, 8 Sim. 277.

<sup>8</sup>2 *Daniell's Ch. Pr.* (2d Am. ed.) 1715. But where there is a partial abatement, as by the death of one defendant, process of contempt may be issued and executed against the others. 2 *Daniell's Ch. Pr.* (2d Am. ed.) 1716.

<sup>9</sup>*Hollingshead's Case*, 1 P. Wms. 743.

<sup>10</sup>*Davies v. Davies*, 9 Ves. 461; *Campbell v. Mesier*, 4 Johns. Ch. 342.

fore its final consummation is by a bill of revivor.<sup>1</sup> In most of the States the statute provides for a summary revival of a suit by a suggestion of the death of the party. These are generally held to apply only to those cases where a bill of revivor was proper under the previous practice, and do not include cases where a supplemental bill was necessary.<sup>2</sup> Nor do such provisions abolish the chancery practice of revival by bill; either remedy may be resorted to at the election of the party.<sup>3</sup>

§ 484. Title to revive.—The general rule is that no person can revive a suit abated by the death of a party unless he is in privity with the deceased. But it is not sufficient that he may, in a legal sense, be a privy in estate; he must be a privy in representation.<sup>4</sup> The words “legal representative” when

<sup>1</sup>Story's Equity Pleading, § 354. “The only methods of reviving a suit in equity in the federal courts seem to be a bill of revivor, a bill in the nature of a bill of revivor, a bill of revivor and supplement, or a supplemental bill in the nature of a bill of revivor.” 1 Foster's Federal Practice (2d ed.), § 178. Where a bill, cross-bill, and supplemental bill in the nature of a bill of review between the same parties and relating to the same subject, are all abated by the death of one of the parties, the whole proceedings may be revived by one bill of revivor. The party reviving will not therefore be allowed the costs of two or more separate bills for that purpose. *Wilde v. Jenkins*, 4 Paige, 481.

<sup>2</sup>*Ross v. Hatfield*, 2 N. J. Eq. 368; *Douglass v. Sherman*, 2 Paige, 358; *Rogers v. Paterson*, 4 Paige, 417; *Daniels v. Brodie*, 8 Edw. Ch. 275. The order for the revival of a suit upon petition should be entitled as in the original cause at the time of the abatement; but all the subsequent orders and proceedings must be entitled in the cause as revived.

*Rogers v. Paterson*, 4 Paige, 450. Where a rule of practice provides for a revivor upon the death of a defendant, by suggestion and order for summons to the representatives, although an amendment of the bill is not a usual mode of introducing the personal representative or heir of a deceased defendant, it may serve the purposes of a suggestion of the death and of the persons who are his representatives; and when they are served with notice to appear, and plead or answer, all the purposes of the rule of practice are satisfied. *Floyd v. Ritter*, 65 Ala. 501.

<sup>3</sup>*Bock v. Bock*, 24 West Va. 586; *Floyd v. Ritter*, 65 Ala. 501; *Foster v. Burem*, 1 Heisk. 783, 785; *Fox v. Abbott*, 12 Neb. 228, 333; *Carter v. Jennings*, 24 Ohio St. 182; *Reid v. Stuart*, 20 West Va. 382, 391.

<sup>4</sup>Lord Coke, in 1 Inst. 271, says: “There are four sorts of privies, viz.: Privies in estate, as donor and donee, lessor and lessee; privies in blood, as heir and ancestor; privies in representation, as executors and administrators; and privies in tenure, as lord and tenant; which are all re-

used in this connection mean an executor or administrator, or devisee in a will, who has the power and authority under the law to legally represent.<sup>1</sup>

**§ 485. Revivor by the defendant or his representatives.** The general rule is strict that before a decree or a decretal order by which a defendant becomes entitled to an interest in the further continuance of the suit, neither he nor his representatives can sustain a bill of revivor.<sup>2</sup> "After a decree the defendants as well as the plaintiffs are entitled to a bill of revivor; and although originally the right appears to have been restricted to those cases in which the defendant had, or was supposed to have, a beneficial interest in the decree, yet it is now well settled that if the defendant or his representatives have any interest in the further prosecution of the suit, the suit may be revived at his instance."<sup>3</sup>

ducible to two heads — privies in law and privies in deed. Now the right to revive is not applicable to all these different sorts of privies, but by the authorities is expressly confined to persons who are in privity by representation, such as heirs in relation to the real estate, and executors and administrators in relation to the personalty." See, also, *Ralston v. Sharon*, 51 Fed. Rep. 702; *Slack v. Walcott*, 8 Mason, 508; *Hawkins v. Chapman*, 86 Md. 88; *Hall v. Hall*, 1 Bland, 131.

<sup>1</sup>*Johnson v. Van Epps*, 110 Ill. 559; *Cox v. Curwen*, 118 Mass. 198; *Cochran v. Cochran*, 127 Pa. St. 490; s. c., 17 Atl. Rep. 981; *Railroad &c. Co. v. Bryan*, 8 Smedes & M. 234; *Warnecke v. Lembea*, 71 Ill. 91; *Bowman v. Long*, 89 Ill. 19; *Ralston v. Sharon*, 51 Fed. Rep. 702.

<sup>2</sup>*Soulliard v. Dias*, 9 Paige, 393, 394; *Benson v. Wolverton*, 16 N. J. Eq. 110; and *Republic of Peru v. Reeves*, 40 N. Y. Super. Ct. 816, holding, also, that the statute providing for revival by order instead of by bill has not altered the rule; *McDer-*

*mott v. McGown*, 4 Edw. Ch. 592; *Griffith v. Bronaugh*, 1 Bland, 547.

<sup>3</sup>*Peer v. Cookerow*, 18 N. J. Eq. 186, 187, citing 1 Mitford's Eq. Pl. by Jeremy, 79, and note *q*; *Lord Stowell v. Cole*, 2 Vern. 219, note 1; *Horwood v. Schmedea*, 12 Ves. 311; *Griffin v. Spence*, 69 Ala. 393, 398; *Rogers v. Paterson*, 4 Paige, 409; *Reid v. Stuart*, 20 West Va. 382; *Wilhanis v. Cooke*, 10 Ves. 406; *Devaynes v. Morris*, 1 Myl. & Cr. 218, 225. See, also, *Nicoll v. Roosevelt*, 3 Johns. Ch. 60. Where a sole complainant or defendant dies after decree either party may revive the suit. *Benson v. Wolverton*, 16 N. J. Eq. 110. In *Peer v. Cookerow*, 18 N. J. Eq., *supra*, and *Anderson v. White*, 10 Paige, 575, the defendant was held entitled to revive for the purpose of appeal. Whether upon the death of a sole complainant, after a dismissal of the bill, the suit may be revived by the defendant, or for the mere purpose of recovering costs, *quære*. *Benson v. Wolverton*, 16 N. J. Eq., *supra*. Upon the death of the complainant after a decretal



**§ 486. Frame of a bill of revivor.**— A bill of revivor must state the original bill, the several proceedings thereon, and the abatement.<sup>1</sup> It must set out enough of the stating part of the original bill to warrant or explain the prayer of the bill of revivor and show the complainant's title to revive.<sup>2</sup> Thus where an executor applies to revive he must show that he has taken probate of the will of the decedent.<sup>3</sup> The bill must also charge that the cause ought to be revived and to stand in the same condition with respect to the parties to the original as it was at the time when the abatement happened; and it must pray that the suit may be revived accordingly.<sup>4</sup> In some cases it may be necessary to pray that the defendant may answer the bill of revivor; and the prayer may vary according to any special circumstances of the case.<sup>5</sup> Thus, where an admission of assets by the representative of a de-

order his representatives have the first right to revive as against the defendant. *Pell v. Elliott*, Hopk. Ch. 86; *Quackenbush v. Leonard*, 10 Paige, 181.

<sup>1</sup> Mitford's Eq. Pl., ch. 1, § 8; Story's Equity Pleading (10th ed.), § 874.

<sup>2</sup> *Phelps v. Sproule*, 4 Sim. 818; United States Equity Rule 58 provides that "It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements of the original bill, unless the special circumstances of the case may require it." This rule was copied from an English order in chancery under which it was held necessary to set out enough of the original pleadings to show the title of the plaintiff, as against the defendant, to revive the suit. *Griffith v. Ricketts*, 8 Hare, 476. The rule is stated in Lord Chief Baron Gilbert's *Forum Romanum*, 209, as follows: — "Where a man brings a bill of revivor grounded upon an original bill and proceedings, he needs to set forth no more thereof, and the best draftsmen in the age have, in that

case, gone no further than thus: 'That your orator, in or about such a time, exhibited his original bill of complaint in this honorable court to be relieved touching certain matters and things therein contained, as by the said bill duly filed and remaining of record in this honorable court appears' (and carry it no further); 'that the defendant such a day put in his answer, as by the said answer remaining of record appears. That witnesses were examined, and the cause being at issue came on to be heard such a day, when it was ordered and decreed so and so.' And here take in the words of the ordering part very shortly, and no more than what is material to the revivor."

<sup>3</sup> *Douglass v. Sherman*, 2 Paige, 858; *Humphreys v. Incledon*, 1 P. Wms. 752.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 874.

<sup>5</sup> 2 Barbour's Ch. Pr. (2d ed.) 47. If the defendant in the original bill dies before answering or filing a sufficient answer, the bill of revivor must pray that the person against whom a revivor is sought may an-

ceased party is requisite, it must pray that if the defendant do not admit assets to answer the purposes of the suit the accounts may be taken.<sup>1</sup> If the bill seeks merely to revive the suit, it prays simply for a subpoena to revive. If it requires an answer, as in the case of a bill against an executor requiring him to admit assets, it prays a subpoena to revive and answer.<sup>2</sup> A bill of revivor must be signed by counsel.<sup>3</sup>

**§ 487. Subpoena upon a bill of revivor.**—A bill of revivor is filed in the same manner as an original bill, and no application for leave to file it is necessary.<sup>4</sup> The subpoena is sued out and served in the same manner as an ordinary subpoena, and is in the same form, except that it states the nature of the bill to which the defendant is required to appear; and pro-

swer the original bill. Cooper's Eq. Pl. 70, 71; Story's Equity Pleading, § 375.

<sup>1</sup> Story's Equity Pleading (10th ed.), § 374.

<sup>2</sup> Mitford's Eq. Pl., ch. 1, § 8; 2 Daniell's Ch. Pr. (2d Am. ed.) 1707.

<sup>3</sup> 2 Daniell's Ch. Pr. (2d Am. ed.) 1707. Where the complainant has a right to revive a suit, he may add to the bill of revivor such supplemental matter as is proper to be added, by way of supplement merely, in that stage of the case. *Pendleton v. Fay* 8 Paige, 204; *Bowie v. Minter*, 2 Ala. 408.

<sup>4</sup> *Pendleton v. Fay*, 8 Paige, 204. United States Equity Rule 56 provides that "whenever a suit in equity shall become abated by the death of either party or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts the proper process of sub-

poena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived as of course." United States Revised Statutes, § 955, provide as follows:—"When either of the parties, whether plaintiff, petitioner, or defendant, dies before final judgment, the executor or administrator may, if the suit survives, prosecute or defend to final judgment. The defendant shall answer, and the cause will be heard and determined and judgment rendered for or against the executor or administrator. If the executor or administrator neglects or refuses to become a party twenty days after being served with a *scire facias*, the court may, nevertheless, render judgment against the deceased party. The executor or administrator on becoming a party is entitled to a continuance until the next term."

cess of contempt may be issued to compel an appearance.<sup>1</sup> Service upon the solicitor of the party in the original cause will not be permitted.<sup>2</sup>

**§ 488. Pleadings and proceedings upon a bill of revivor.** If a bill of revivor does not show a sufficient ground for reviving the suit or any part of it, either by or against the person by or against whom it is brought, the defendant may, by demurrer, show cause against the revival.<sup>3</sup> A demurrer will lie for want of privity,<sup>4</sup> or for want of sufficient interest in the party seeking to revive, or for some imperfection in the frame of the bill.<sup>5</sup> If the bill is unnecessarily or improperly filed, the objection may also be taken by demurrer.<sup>7</sup> If a bill is brought without sufficient cause to revive, and this fact is

<sup>1</sup> 2 Daniell's Ch. Pr. (2d Am. ed.) 1707.

<sup>2</sup> *Brown v. Lee*, 2 Dick. 545; *Lee v. Warner*, 2 Dick. 546. But see *Dunn v. Clark*, 8 Pet. 1, 2; *Norton v. Hepworth*, 1 Hall & Twell. 158; 1 Foster's Federal Practice (2d ed.), § 96.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 617 *et seq.*; *University College v. Foxcroft*, 2 Ch. Rep. 244. An answer may be a waiver of objections. *Nanney v. Totty*, 11 Price, 117, 121. See *Harris v. Pollard*, 3 P. Wms. 848. But if there is no demurrer, and the plaintiff shows no title to revive, he will take nothing by his suit at the hearing. Mitford's Equity Pleading, by Jeremy, 202, 289, 290.

<sup>4</sup> Story's Equity Pleading, § 620. "The only questions which can be raised upon a bill of revivor are whether the party in whose name the revival is asked has succeeded to the interests, rights or claims of the deceased, or has become the legal representative of his estate so as to enable him to continue the prosecution of the suit, if not already determined, or to revive it so as to enforce the judgment rendered, if not already executed." Per Justice Field, in *Sharon v. Terry* (Cal., 1888), 36 Fed. Rep. 337.

See, also, *Peer v. Cookerow*, 14 N. J. Eq. 361, where it was held that an attack upon a judgment in a proceeding to revive it is a collateral attack, and can avail only when there is an absolute want of jurisdiction either of the parties or of the subject-matter.

<sup>5</sup> As in case of a bill of revivor for untaxed costs merely, or by a defendant before decree. Story's Equity Pleading (10th ed.), §§ 620, 621.

<sup>6</sup> As if the bill fails to make proper parties, or omits to state facts necessary to support the revivor. Story's Equity Pleading (10th ed.), §§ 622-626.

<sup>7</sup> *Pendleton v. Fay*, 3 Paige, 204. The mere fact that the time limited by statute for appealing has elapsed since the signing of the decree cannot be urged against a bill of revivor for the purpose of appeal, under a general demurrer for want of equity. The matter of limitation must be pleaded, even though the objection appear upon the record. *Peer v. Cookerow*, 13 N. J. Eq. 136. A bill to revive a suit in equity, founded on a judgment obtained more than twenty years before the bill was filed, was dismissed on demurrer. *Bird v. Inslee*, 23 N. J. Eq. 363.

not apparent on the face of the bill, the defendant may plead the matter necessary to show that the complainant is not entitled to revive the suit against him.<sup>1</sup> Or, if the complainant is not entitled to revive the suit at all, although a title is stated in the bill, so that the defendant cannot demur, the objection to the complainant's title may be taken by way of plea.<sup>2</sup> So if a person who is entitled to revive a suit does not proceed in due time, the statute of limitations, if applicable, may be pleaded to a bill of revivor afterwards filed.<sup>3</sup> Objection for want of proper parties may be taken by plea.<sup>4</sup> An answer, unless the bill calls for it, is unnecessary and inexpedient;<sup>5</sup> and where an answer is required, it is open to exceptions for scandal and impertinence, the same as an answer to an original bill.<sup>6</sup> An answer must be signed by counsel and filed in the same manner as other answers.<sup>7</sup> If the answer does not admit the complainant's title to revive, or states any circumstances which the complainant is desirous of controverting, it must, if the abatement has occurred after decree, or after issue joined in the original cause, be replied to.<sup>8</sup> Otherwise a separate replication is unnecessary.<sup>9</sup> If the bill prays merely a revivor, no hearing is necessary, the mere order of revivor

<sup>1</sup> Story's Equity Pleading (10th ed.), § 829; *Pendleton v. Fay*, 8 Paige, 204.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 829; *Pendleton v. Fay*, 8 Paige, 204.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 881; *Hollingshead's Case*, 1 P. Wms. 742. See *Egremont v. Hamilton*, 1 Ball & B. 581; *Perry v. Jenkins*, 1 Myl. & Cr. 118; *Murray v. East India Co.*, 5 Barn. & Ald. 204; *Mason v. Hartford & Co. R. Co.*, 19 Fed. Rep. 58.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 830; *Fallowes v. Williamson*, 11 Ves. 306; *Bettes v. Dana*, 2 Sumner, 388. The general doctrine is that objections taken to the original bill, or which might have been taken, cannot be again made upon a bill of revivor, where the original suit is abated on the death of the plaintiff. *Sharon v. Terry*, 36 Fed. Rep. 387.

<sup>5</sup> *Harris v. Pollard*, 8 P. Wms. 348;

<sup>6</sup> *Daniell's Ch. Pr.* (2d Am. ed.) 1709; *Codrington v. Houlditch*, 5 Sim. 286; *Lewis v. Bridgman*, 2 Sim. 465. No formal replication to an answer to a bill of revivor is required to avoid its effect as evidence in the cause. New defenses set up in an answer to a bill of revivor cannot be considered, and no formal replication is necessary to avoid its effect as evidence. *Fretz v. Stover*, 22 Wall. 198; *Gunnell v. Bird*, 10 Wall. 304.

<sup>7</sup> *Nanny v. Totty*, 11 Price, 117; *Wagstaff v. Bryan*, 1 Russ. & My. 28; *Langley v. Overton*, 11 Sim. 305.

<sup>8</sup> *Daniell's Ch. Pr.* (2d Am. ed.) 1712.

<sup>9</sup> *Daniell's Ch. Pr.* (2d Am. ed.) 1712.

<sup>10</sup> *Cotton v. Earl of Carlisle*, 5 Mad. 427.

being effectual in all cases.<sup>1</sup> But if the right to revive is contested in the answer, or the bill contains supplemental matter, a hearing must be had, which is brought on in the usual mode.<sup>2</sup> If the decision is in favor of the bill, the order pronounced will be that the original suit stand revived, and be carried on and prosecuted between the parties to such suit in like manner as between parties to the original suit.<sup>3</sup>

§ 489. What renders a suit defective.—If, after the institution of a suit, a person who is a necessary party thereto comes into being, or any other event occurs which, without abating the suit, occasions such an alteration in the interest of any of the original parties, or gives any person not a party such an interest therein, as makes it necessary that a change of interest shall be brought to the attention of the court, and the person not already a party brought before it, the suit is said to become defective.<sup>4</sup> Under such circumstances the plaintiff or the defendant, as the case may be, is entitled to supply the defect by means of a supplemental bill.<sup>5</sup> In the federal courts the rule is well settled that “an assignment by a defendant of all his interest in a litigation does not necessarily defeat the suit. His assignee *pendente lite* is bound by what is done against him. The assignee may, at his own election, come in by an appropriate application and make himself a party so as to assume the burden of the litigation in his own name, or he may act in the name of his assignor. A *pendente lite* assignment carries with it an ample license by the assignor for the use of his name in the cause by the as-

<sup>1</sup> Pruen v. Lunn, 5 Russ. 8.

<sup>2</sup> 2 Barbour's Ch. Pr. (2d ed.) 57; Hoffman's Ch. Pr. (2d ed.) 888.

<sup>3</sup> Day v. Potter, 9 Paige, 645; Harris v. Pollard, 8 P. Wms. 848. Where the court overrules a demurrer to a bill to revive a decree, it should not order the defendant to plead over, but it should at once make the proper order reviving the decree. Nye v. Slaughter, 27 Miss. 688. On a bill of revivor there must be an order that the bill be revived before final decree. Pickering v. Walcott, 1 Ind. 262. An order to revive in the name

of an executor without stating that it was at his instance, the record not showing that he had notice, cannot support a decree against him. Smith v. Bryant, 7 J. J. Marsh. 874.

<sup>4</sup> 2 Daniell's Ch. Pr. (2d Am. ed.) 1721. As to dismissal of a suit for failure to perfect the same, see Bolton v. Bolton, 2 Sim. & Stu. 871; Hinde v. Morton, 2 H. & M. 868; Adamson v. Hall, 1 Turn. & Russ. 258; Robinson v. Norton, 10 Beav. 484.

<sup>5</sup> Story's Equity Pleading (10th ed.), 330; Greenleaf v. Queen, 1 Pet. 138, 148.

signee to perfect the rights assigned. Of this the plaintiffs in the action cannot complain, because the assignee is bound by all that is done whether a party by name or not.”<sup>1</sup> The rule has elsewhere been stated as follows:—“The general rule is that where an interest in the subject of the suit is obtained *pendente lite* by a stranger to such suit through the force of general laws, such as assignments in bankruptcy and insolvent acts, such stranger must be joined as a party before the proceedings can be carried further. The distinction is between cases of voluntary alienation and cases of involuntary alienation. In the latter class of cases the assignee must be made a party; in the former he may or may not at the pleasure of the complainant.”<sup>2</sup>

§ 490. General nature of supplemental bills.—“The province of a supplemental bill is to bring before the court material matters which have occurred since the original bill was filed; or matters which existed previously (at least for the purpose of a further discovery) when the cause is in that stage in which it cannot be done by amendment; or in a similar state of the cause, to add parties; or to remedy a defect in

<sup>1</sup> Waite, C. J., in *Ex parte Railroad Co.*, 95 U. S. 221, 226. The same rule applies where a party becomes bankrupt. *Eyster v. Gaff*, 91 U. S. 521.

<sup>2</sup> *Davis v. Sullivan*, 33 N. J. Eq. 569, 572, citing Story's Equity Pleading, § 342. See *Mount v. Manhattan Co.*, 43 N. J. Eq. 26; *Sedgwick v. Cleveland*, 7 Paige, 287, where Chancellor Walworth discusses extensively and minutely the effect of the bankruptcy or insolvency of a party to the suit; *Garr v. Gomez*, 9 Wend. 649; *Zane v. Flint*, 18 West Va. 693; *Springer v. Vanderpool*, 4 Edw. Ch. 362; *Hathaway v. Scott*, 11 Paige, 173; *Storm v. Davenport*, 1 Sandf. Ch. 185; *Anon.*, 10 Paige, 20; *Mills v. Hoag*, 7 Paige, 18; *Scouten v. Bender*, 1 Barb. Ch. 647; *Johnson v. Fitzhugh*, 8 Barb. Ch. 360; *Penniman v. Norton*, 1 Barb. Ch. 246; *Lenihan v. Hamann*, 14 Abb. Pr. (N. S.) 274; *Raymond v.*

*Johnson*, 11 Johns. 488; *Gale v. Vernon*, 1 Sandf. 679; *Gibson v. Green*, 45 Miss. 209; *Murray v. Murray*, 5 Johns. Ch. 60; *Woddail v. Holliday*, 44 Ga. 18; *Noonan v. Orton*, 84 Wis. 259; *Fellows v. Hall*, 8 McLean, 487; *Hecht v. Wassell*, 27 Ark. 412; *Stone v. Brookville Bank*, 39 Ind. 284. Many cases on the subject are cited by the reporter in a note to *Esterbrook &c. Manuf. Co. v. Ahern*, 30 N. J. Eq. 341. A plaintiff in a bill to redeem who conveys his interest in the land *pendente lite* is not entitled to a decree. *Johnson v. Thompson*, 129 Mass. 398. “The principle is elementary that a complainant suing in his own right, and alone, cannot, after he has parted with his whole interest in the subject-matter of the litigation, further prosecute the action.” *Fulton v. Greeacen*, 44 N. J. Eq. 448, 446.



the prayer of the original bill.”<sup>1</sup> It may be filed after as well as before a decree,<sup>2</sup> and on behalf of a defendant.<sup>3</sup> It is merely an addition to and continuation of the original suit.<sup>4</sup> Subpœnas in the original suit should be served before a supplemental bill is filed.<sup>5</sup> It is too late to file a supplemental bill after a dismissal of the original bill;<sup>6</sup> but permission may be reserved in the decree of dismissal.<sup>7</sup> A supplemental bill is used to state new matter and not to set forth a mere discovery of further evidence.<sup>8</sup>

**§ 491. Petition instead of supplemental bill.**—In New Jersey the practice of applying to be made a party defendant by petition instead of by supplemental bill is specially authorized by statute in certain cases, and the courts have shown a disposition to extend it further where there is no good reason against it. Thus it was held that a subsequent incumbrancer may be admitted as a party by petition in a foreclosure suit.<sup>9</sup> In Massachusetts, where the statute provides

<sup>1</sup> Hoffman's Ch. Pr. (2d ed.) 898. See United States Equity Rule 57.

<sup>2</sup> Woodward v Woodward, 1 Dick. 33; Jenkins v Eldridge, 3 Story (C. C.), 307; Boeve v. Skipwith, 1 Eq. Cas. Abr. 80; Dormer v. Fortescue, 3 Atk. 124; Jones v. Jones, 3 Atk. 110; Cropper v. Knapman, 2 Y. & Coll. 888; Simmons v. Gutteridge, 13 Ves. 262. Or after the appellate court has remanded the cause for further proceedings. Greer v. Turner, 86 Ark. 17. But it must not seek to vary the principles of the decree. O'Hara v. Shepherd, 3 Md. Ch. 306.

<sup>3</sup> Story's Equity Pleading (10th ed.), 837; Baker v. Whiting, 1 Story (C. C.), 218; Barrington v. O'Brien, 2 Ball & B. 140; Standish v. Radley, 2 Atk. 177; Gould v. Tancred, 2 Atk. 538.

<sup>4</sup> Story's Equity Pleading (10th ed.), § 832; Milner v. Milner, 2 Edw. Ch. 114. One who was a solicitor or counsel in the original suit cannot act as a master in proceedings on the supplemental bill. M'Laren v. Charrier, 5 Paige, 530.

<sup>5</sup> Outwater v. Berry, 6 N. J. Eq. 68.

<sup>6</sup> Emory v. Keighan, 88 Ill. 516; Burke v. Smith, 15 Ill. 158.

<sup>7</sup> Allen v. Allen, 3 Tenn. Ch. 145.

<sup>8</sup> North American Coal Co. v. Dyett, 2 Edw. Ch. 115; Atwood v. Shenandoah, 85 Va. 966; s. c., 9 S. E. Rep. 748; Jenkins v. Eldredge, 3 Story, 299.

<sup>9</sup> Leveridge v. Marsh, 30 N. J. Eq. 59, 60. The subject of admitting new parties is treated in the sections on "Intervention" in chapter XVII, *infra*. In Hoppock v. Cray (N. J. Ch.), 21 Atl. Rep. 624, Vice-chancellor Bird said:—"There can be no doubt that in many cases where irregularity in the proceedings in a cause is to be brought to the attention of the court it may be done by petition. Such has been the practice in several instances in this State; but my understanding of the rule is that when new matter is introduced, which has had its origin since the filing of the bill, and with which third parties have been connected, who should or properly may be made parties to the further proceeding, then a supplemental bill is not only proper but



that a new trustee shall have and exercise the same rights and duties as if originally appointed, he may be admitted on his own petition to prosecute a bill in equity filed by his predecessor to recover the trust estate.<sup>1</sup>

**§ 492. Supplemental bill not a substitute for amendment.**— A supplemental bill (strictly so called) is, in the first place, proper whenever the imperfection in the original bill arises from the omission of some material fact which existed before the filing of the bill, but the time has passed in which it can be introduced into the bill by an amendment.<sup>2</sup> But whenever the same end may be obtained by an amendment the court will not permit a supplemental bill to be filed.<sup>3</sup> So where, according to the modern practice, matter arising since the original bill was filed but before answer may be inserted in the bill by amendment, it cannot, if known in time to be inserted, be brought into the suit by supplemental bill.<sup>4</sup>

justified by the best authorities." *Salinas v. Pearsall*, 24 S. C. 179, affirms the general rule that new matter cannot be introduced by petition.

<sup>1</sup> *Murray v. Dehon*, 102 Mass. 11. Where trustees are changed pending a suit against the trust fund, if the presence of the new trustees is necessary or desirable, a supplemental bill is required. *North American Coal Co. v. Dyett*, 2 Edw. Ch. 115. See, also, *King v. Donnelly*, 5 Paige, 46. So where a personal decree is sought against a purchaser *pendente lite*. *Livingston v. Freeland*, 8 Barb. Ch. 510. Where an alleged settlement of a case pending proceedings in the same is presented to the court by petition of one of the parties, and a hearing is had thereon without objection by the adverse party that the matter should be set up by supplemental bill, the court will not set aside a decree made upon the facts proved. *Cedar Valley L. & C. Co. v. Coburn*, 29 Fed. Rep. 586.

<sup>2</sup> *Story's Equity Pleading* (10th ed.), § 333; *Veazie v. Williams*, 8 Story,

54; *Dodge v. Dodge*, 29 N. H. 177; *Stafford v. Howlett*, 1 Paige, 200.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 333; *Murray v. King*, 5 Ired. (N. C.) Eq. 223; *Stafford v. Howlett*, 1 Paige, 200. To defeat a supplemental bill "it is sufficient if it appears that the facts sought to be set up by way of a supplemental bill were known in time to have been presented by way of amendment to the original bill. It is not enough that they were not known when the original bill was filed." *McCrary, J.*, in *Mosgrove v. Kountze*, 14 Fed. Rep. 315, 316, 317.

<sup>4</sup> *Henry v. Travelers' Ins. Co.*, 45 Fed. Rep. 299, where the original bill alleged that the defendant was about to sell certain stocks delivered to it as collateral security for money loaned to the plaintiffs and prayed a full accounting and injunction against the threatened sale, and that in case any sales were made before final hearing they might be declared void. After an account had been taken the plaintiffs filed a supple-

§ 493. Use of supplemental bills illustrated.— Where an original bill was properly filed by a guardian to reach the property of the defendant after the return of an execution unsatisfied, it was held that a supplemental bill was proper to reach subsequently acquired property to satisfy the same debt.<sup>1</sup> A purchaser of the right of one of the parties to a suit pending the litigation will not, without the consent of the other parties to the suit, be permitted to come in and take a part in the proceedings in the cause, unless he makes himself a party by filing a supplemental bill.<sup>2</sup> Where, on a bill to redeem a mortgage and for an account from the mortgagee in possession, the latter answered that he had assigned the mortgage to a person named, the cause was ordered to stand over without cost (the assignment being unrecorded), with leave to the complainant to file a supplemental bill to bring in the assignee.<sup>3</sup> A general creditor having filed his bill for relief, and having subsequently obtained judgment and execution at law, is not entitled to relief upon his original bill, though a decree *pro confesso* be taken against the defendant. A supplemental bill should be filed stating the facts which entitle him to relief.<sup>4</sup> Where a bill has been filed by creditors to subject the land of a decedent to the payment of his debts, and it is discovered before the termination of the suit that some other

mental bill alleging that a sale had been made and praying damages. It was held that as the plaintiffs knew all the facts connected with the sale before the defendant answered, this new matter should have been brought in by amendment. Moreover, the proceeds of the sale were taken into consideration in the accounting, and at the hearing there were no exceptions to the master's report, and the supplemental bill was filed more than five years after the plaintiffs had notice of the sale and several months after final decree. The supplemental bill was dismissed on demurrer. Where no occurrence has taken place to change the rights of the parties subsequent to the commencement of the suit, the complainant cannot, after the cause is at issue, file a sup-

plemental bill for the mere purpose of putting in issue new matters which might have been introduced into the original bill by way of amendment, although the new facts were not known to the complainant until after the cause was at issue on the original bill. The proper course for the complainant, where the proofs have not yet been taken, is to apply for leave to withdraw his replication and to amend. *Dias v. Merle*, 4 Paige, 259.

<sup>1</sup> *Eager v. Price*, 2 Paige, 334.

<sup>2</sup> *Wilder v. Keeler*, 8 Paige, 164. See *Watt v. Crawford*, 11 Paige, 470; § 489, *supra*.

<sup>3</sup> *Fritz v. Simpson*, 34 N. J. Eq. 436.

<sup>4</sup> *Edgar v. Clevenger*, 3 N. J. Eq. 258; *Candler v. Pettit*, 1 Paige, 168.

person has an interest in the land who had not been made a party to the suit, he may be brought before the court by a supplemental bill.<sup>1</sup> In an action by a wife for her share of the community property, plaintiff was properly allowed to file a supplemental petition alleging that a certain house, standing in the name of another, was in fact defendant's property.<sup>2</sup> A complainant to whom a mortgage has been assigned as security for a specific debt can only have a decree for that debt, although pending the foreclosure suit the whole mortgage is absolutely assigned to him. His remedy for the residue must be by supplemental bill or petition for surplus should the premises be sold.<sup>3</sup> After the filing of a bill a decree in another suit between the same parties settled part of the matter in controversy, and it was held to be properly set up by way of supplemental bill, being in support of the relief originally prayed for.<sup>4</sup> Upon the hearing of a cause if it appears that all the proper parties are not before the court, the complainant may be permitted to file a supplemental bill to bring in the necessary parties.<sup>5</sup> In strict practice a complainant is put to his supplemental bill and a defendant to his own cross-bill, to raise a defense, arising *pendente lite*, against a co-defendant.<sup>6</sup>

§ 494. The same subject continued.—When new events or new matters have occurred since the filing of the original bill, a supplemental bill is in many cases the proper mode of bringing them before the court.<sup>7</sup> Thus, where a mortgagor filed a bill for an accounting on the mortgage note, and sub-

<sup>1</sup> *Robertson v. Winchester*, 85 Tenn. 171; s. c., 1 S. W. Rep. 781. "Nothing is more usual than to file a supplemental bill for the purpose of bringing a new party before the court." *Greenwood v. Atkinson*, 5 Sim. 419, 428. When a supplemental bill is filed bringing new parties into court it is as to them a new suit, and is to be considered as being commenced when the supplemental bill is filed in office. *Morgan v. Morgan*, 10 Ga. 297.

<sup>2</sup> *McCaffrey v. Benson*, 40 La. Ann. 10; s. c., 3 So. Rep. 898.

<sup>3</sup> *Underhill v. Atwater*, 22 N. J. Eq. 17.

<sup>4</sup> *Jenkins v. International Bank*, 127 U. S. 484.

<sup>5</sup> *Jenkins v. Freyer*, 4 Paige, 47.

<sup>6</sup> "It is true that a departure from the earlier practice enables a defendant without cross-bill to attack a co-defendant; but the rule has never been so far relaxed as to permit matter happening after the institution of the suit to be put in evidence without a supplemental or cross-bill." *National Bank v. Sprague*, 21 N. J. Eq. 580, 588.

<sup>7</sup> *Story's Equity Pleading* (10th ed.),

sequently tendered the mortgagee a certain sum in discharge of the mortgage, which the mortgagee received, but then declined to satisfy the mortgage, it was held that the plaintiff could only bring in this new matter by supplemental bill in order to obtain the relief to which it entitled him.<sup>1</sup> "Wherever a party is permitted to file a supplemental bill for the purpose of introducing matters which have arisen since the filing of the original bill, the court will also give to the complainant permission to introduce other matters into the supplemental bill which might have been introduced by way of amendment to the first bill."<sup>2</sup>

**§ 495. Making a new case by supplemental bill.**—A new case cannot be introduced by a supplemental bill which has not a near relation to or a natural connection with the original bill and where the relief is not a modification or enlargement of that originally sought.<sup>3</sup> Thus where a bill sought relief against defendants as a partnership, a supplemental bill

§ 386; *Burke v. Smith*, 15 Ill. 158; *Cedar Valley L. & C. Co. v. Coburn*, 29 Fed. Rep. 586; *Hoppock v. Cray* (N. J. Ch.), 21 Atl. Rep. 624. Especially where the practice of the court does not allow such matter to be inserted by amendment. *Collins v. Lavenberg*, 19 Ala. 682; *Barringer v. Burke*, 21 Ala. 765. It was said in *Allen v. Taylor*, 8 N. J. Eq. 485, that a strictly supplemental bill is always founded on facts that have occurred since the filing of the original bill. "The more general and approved practice is, as we understand it, that if the defendant has discovered any new matter of which he would avail himself, or when any event happens subsequent to filing an original bill which gives a new interest or right to a party, it should be set out in a supplemental bill." *Gove v. Lyford*, 44 N. H. 525, citing *Saunders v. Frost*, 5 Pick. 279; *Eastman v. Batchelder*, 36 N. H. 154. When a complainant would assert matter which arose after the cause is at issue as a defense to a defendant's cross-bill,

the proper mode is to file a supplemental bill. *Jenkins v. International Bank*, 111 Ill. 462, 470. After a replication has been filed, and an order of reference obtained, a plaintiff cannot file a supplemental bill to bring before the court facts known to him before the filing of the replication. *Dias v. Merle*, 4 Paige, 259. See § 492, n. 4, at p. 510, *supra*. A supplemental bill based on newly-discovered matter should always be filed as soon as practicable after the matter is discovered. *Henry v. Travelers' Ins. Co.*, 45 Fed. Rep. 299; *Story's Equity Pleading* (10th ed.), § 388.

<sup>1</sup> *Fisher v. Holden* (Mich.), 47 N. W. Rep. 1068.

<sup>2</sup> Chancellor Walworth in *Stafford v. Howlett*, 1 Paige, 200, 201.

<sup>3</sup> *Maynard v. Green*, 80 Fed. Rep. 648; *Milwaukee &c. R. Co. v. Milwaukee & St. Paul R. Co.*, 6 Wall. 742; *Turner v. Pierce*, 81 Wis. 342; *Ledwith v. Jacksonville* (Fla., 1893). 18 So. Rep. 455. See *Pinch v. Anthony*, 10 Allen, 470, 477.

seeking entirely distinct relief against them as a corporation was not allowed.<sup>1</sup> But where a bill was brought to foreclose securities pledged to secure certain notes, and a supplemental bill was filed in the suit setting up that, pending the suit, an accounting had been decreed between the parties, and a certain sum found due on the notes, it was held that the supplemental bill did not state a different cause of action from the original bill, since the debt was the same, though the evidence of it had been changed from notes to a decree.<sup>2</sup> So where the original bill asked for a balance due on account and for general relief, there was no departure in a supplemental bill asking for the balance due on the account, or for that amount as damages for an alleged fraud.<sup>3</sup>

§ 496. **The same subject continued.**—A complainant who has no cause of action at the time of filing his original bill cannot maintain a supplemental bill upon a cause of action that accrued thereafter, even though it arose out of the same transaction that was the subject of the original bill.<sup>4</sup> Nor is the objection waived by the failure of the defendant to raise it by demurrer. It may be insisted upon at the hearing where the evidence discloses the facts.<sup>5</sup> But where the original bill is founded on an existing cause of action, the objection

<sup>1</sup> *Maynard v. Green*, 80 Fed. Rep. 648.

<sup>2</sup> *Jenkins v. International Bank*, 111 Ill. 462. See, also, *Gage v. Parker*, 108 Ill. 528.

<sup>3</sup> *Grabenheimer v. Blum*, 68 Tex. 369.

<sup>4</sup> *Stranghan v. Hallwood*, 30 West Va. 274, 291; s. c., 4 S. E. Rep. 394; *Pinch v. Anthony*, 10 Allen. 470, 477; *Winn v. Albert*, 2 Md. Ch. 42; *Milner v. Milner*, 2 Edw. Ch. 114; *Crumph v. Perkins*, 18 Fla. 353, 360; *Candler v. Pettit*, 1 Paige, 168; *Edgar v. Clevenger*, 3 N. J. Eq. 259; *Bannon v. Comegys*, 69 Md. 411; *Evans v. Bagshaw*, L. R. 8 Eq. 469, 471; *Godfrey v. Tucker*, 83 Beav. 285; *Fahs v. Roberts*, 54 Ill. 192; *Miller v. Cook*, 185 Ill. 190; s. c., 25 N. E. Rep. 756,

760. See, also, *Hill v. Hill*, 10 Ala. 527; *Vaughan v. Vaughan*, 30 Ala. 330, 334. But cf. *Gillett v. Hall*, 18 Conn. 426, where it was held that when a supplemental bill has been properly allowed and filed, it becomes a part of the original bill in such a sense that if the jurisdiction of the court could not be supported on the original bill, but can on the supplemental bill, it will be supported as to both taken together.

<sup>5</sup> *Stranghan v. Hallwood*, 30 West Va. 274, 291; s. c., 4 S. E. Rep. 394; *Butchers' & Drovers' Bank v. Willis*, 1 Edw. Ch. 645. In New York the objection was held too late on appeal. *Luft v. Manhattan R. Co.*, 14 N. Y. Supl. 876; *Preusser v. Stockton*, 14 N. Y. Supl. 876.

that the supplemental bill introduces a new cause may be waived by omitting to demur and consenting to a hearing.<sup>1</sup>

**§ 497. Supplemental bills inconsistent with original.**—A supplemental bill should not be allowed where it makes a case in utter and irreconcilable conflict with the grounds on which the original bill was based.<sup>2</sup> A supplemental bill for an accounting between partners will not be allowed if it makes a case antagonistic to that made by the original bill, and this though it be based on facts occurring after the filing of the original bill.<sup>3</sup> A bill was filed claiming under an execution of a power to sell contained in a will, which proved defective, and praying an injunction upon a judgment for land recovered by the heirs. It was held that a supplemental bill, charging that since the filing of the original the defect in the will had been supplied, overruled the original bill.<sup>4</sup>

**§ 498. Retaining original bills to permit supplemental bills.**—If an original bill be sustainable on any ground, even for the purpose of granting temporary relief, the court having possession of the case may hold it for the more general and important purposes, and will permit the complainant to file a supplemental bill if the facts warrant it.<sup>5</sup> Thus a mortgagee having filed a bill before the debt became due, for an injunction against waste, may file a supplemental bill for foreclosure after the debt is due.<sup>6</sup> And where a bill was insufficient to support the relief prayed for solely by rea-

<sup>1</sup> *Pinch v. Anthony*, 10 Allen, 471; *Hallwood*, 80 West Va. 274; s. c., 4 Crump v. Perkins, 18 Fla. 353, 360; *S. E. Rep.* 394, dismissing at the hearing a bill filed by leave of the court. *Pingree v. Coffin*, 12 Gray, 288, 323; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 369.

<sup>2</sup> "In such a case the court, at the hearing, might give to the statements and grounds set out in the original bill a liberal construction, so as to reconcile them, and might not refuse the plaintiffs relief simply because some of the statements of the supplemental bill were in conflict with statements in the original bill. *Cho-teau v. Rice*, 1 Minn. 106. But it could do no more." *Straghan v.*

<sup>3</sup> *Maynard v. Green*, 30 Fed. Rep. 648. In *Leonard v. Cook* (N. J. Ch.), 21 Atl. Rep. 47, on a complicated state of facts, the original and supplemental bills were held to be so inconsistent as to destroy the complainant's standing in court.

<sup>4</sup> *Sanderlin v. Thompson*, 2 Dev. Eq. (N. C.) 539.

<sup>5</sup> *Edgar v. Clevenger*, 3 N. J. Eq. 259.

<sup>6</sup> *Allen v. Taylor*, 3 N. J. Eq. 435.



son of want of a certain notice to the defendant, it was retained to allow the complainant to give the requisite notice and file a supplemental bill.<sup>1</sup> If the original bill is sufficient for one kind of relief, and facts afterwards occur which entitle the complainant to other or more extensive relief, he may have such relief by setting out the new matter in a supplemental bill.<sup>2</sup>

**§ 499. Title of complainant in a supplemental bill.**—To entitle the plaintiff to file a supplemental bill and thereby to obtain the benefit of the former proceedings, it must be in respect to the same title, in the same person, as stated in the original bill.<sup>3</sup> Thus, if a person should file an original bill to redeem as heir at law of the mortgagor, and it should turn out upon an issue and hearing of the cause that he is not the heir at law, and he afterwards purchases the title of the true heir at law, he cannot file a supplemental bill to have the benefit of the former proceedings; for he claims by a different title from that asserted in the original bill. His true course would be to file an original bill.<sup>4</sup>

**§ 500. Leave to file a supplemental bill.**—As a general rule it is irregular for a complainant to file a supplemental bill without first obtaining leave from the court,<sup>5</sup> especially

<sup>1</sup> *Duffield v. Brainerd*, 45 Conn. 425, 430. See, also, *Hunter v. Hallett*, 1 Edw. Ch. 888, 893, where the cause was suffered to stand over to allow the complainant, a surviving husband, to take out letters of administration.

<sup>2</sup> *Candler v. Pettit*, 1 Paige, 168.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 339. See, also, *Ralston v. Sharon*, 51 Fed. Rep. 702.

<sup>4</sup> *Story's Equity Pleading* (10th ed.), § 339; *Tonkin v. Lethbridge*, Cooper, 43; *Oldham v. Eboral*, 1 Cooper's Sel. Cas. 27; *Rylands v. Latouche*, 2 Bligh, 566; *Pilkingtton v. Wignall*, 2 Mad. 240; *Bannon v. Comegys*, 69 Md. 411.

<sup>5</sup> *Hoffman's Ch. Pr.* (2d ed.) 408; *Story's Equity Pleading* (10th ed.),

§ 333, note a; 2 *Barbour's Ch. Pr.* (2d ed.) 73; *Buckingham v. Corning*, 29 N. J. Eq. 238; *Walker v. Hallett*, 1 Ala. 879; *Allen v. Taylor*, 8 N. J. Eq. 435; *Kimble v. Seal*, 92 Ind. 276; *Winn v. Albert*, 2 Md. Ch. 42; *Secor v. Singleton*, 41 Fed. Rep. 725; *Bowie v. Minter*, 2 Ala. 406; *Ashuelot R. Co. v. Cheshire R. Co.*, 59 N. H. 409; *Tappan v. Evans*, 12 N. H. 880; *Gove v. Lyford*, 44 N. H. 525; *Pedrick v. White*, 1 Met. 76; *Edmonds v. Robinson*, 29 Ch. D. 170; *United States Equity Rule* 57. See § 504, note 9, *infra*. Leave may be implied, as by an order granting an injunction asked for in the supplemental bill. *Eager v. Price*, 2 Paige, 884. In *Miller v. Clark*, 49 Fed. Rep. 695, it seems that a supplemental bill was filed



where a decree has been entered,<sup>1</sup> or it is sought to change the issue raised by the original bill.<sup>2</sup> If a supplemental bill becomes necessary in conjunction with a bill of revivor, an application need not be made to the court.<sup>3</sup> An order granting leave to file a supplemental bill is not to be treated as an adjudication upon its sufficiency; that question is to be determined in the usual way.<sup>4</sup>

**§ 501. Application for leave.**— An order granting leave to file a supplemental bill may generally be made upon an *ex parte* application.<sup>5</sup> But notice is necessary where the complainant asks for a preliminary injunction or some other special relief upon the matter of the supplementary bill, previous to the appearance of the defendant thereto.<sup>6</sup> The application should be by petition<sup>7</sup> stating the relief sought by the original bill, the new matters which have occurred, and praying leave to exhibit a supplemental bill to set them forth, with all proper circumstances and explanations, and to pray such relief upon them as the petitioner may be advised he is entitled to.<sup>8</sup>

**§ 502. The same subject continued — Hearing on petition — Exercise of discretion.**— Leave to file a supplemental bill is granted much as of course if probable cause for filing it

without leave and not objected to on that ground.

<sup>1</sup> *Tappan v. Evans*, 12 N. H. 380; *Perry v. Philips*, 17 Ves. 178.

<sup>2</sup> *Ashuelot & Co. R. Co. v. Cheshire R. Co.*, 59 N. H. 409; *Colclough v. Evans*, 4 Sim. 76; *Jones v. Jones*, 3 Atk. 110; *Crompton v. Wombwell*, 4 Sim. 628.

<sup>3</sup> *Hoffman's Ch. Pr.* (2d ed.) 404; *Pendleton v. Fay*, 3 Paige, 106; *Utica Ins. Co. v. Lynch*, 3 Paige, 210. See § 486, n. 3, at p. 503, *supra*.

<sup>4</sup> *Turner v. Pierce*, 31 Wis. 342.

<sup>5</sup> *Hoffman's Ch. Pr.* (2d ed.) 408; *Eager v. Price*, 2 Paige, 334; *Walker v. Hallett*, 1 Ala. 379. But United States Equity Rule 57 requires "due notice to the other party." And notwithstanding the mandatory pro-

visions of the New York code, it has been held that an order on an *ex parte* application is improper. *Fleischmann v. Bennett*, 79 N. Y. 579.

<sup>6</sup> *Lawrence v. Bolton*, 3 Paige, 294. In a doubtful case the court may direct notice, although the defendant has appeared. *Eager v. Price*, 2 Paige, 334.

<sup>7</sup> *Hoffman's Ch. Pr.* (2d ed.) 408. See, also, *Parkhurst v. Kinsman*, 3 Blatch. 72. *Barbour's Ch. Pr.* (2d ed.) 74, says it may be made by motion or petition.

<sup>8</sup> *Hoffman's Ch. Pr.* (2d ed.) 408. The averments of the proposed bill need not be set out, but only the ground of relief sought. *Parkhurst v. Kinsman*, 3 Blatch. 72.

is shown.<sup>1</sup> Ordinarily the court examines the question only so far as to see that it is not intended for delay or vexation,<sup>2</sup> in which case it will as of course refuse leave.<sup>3</sup> The practice of dealing with such applications under the rule in the federal courts has always been liberal to the applicant. Objections which may more properly be raised by demurrer will not be considered, and grave doubts of the complainant's right to the relief prayed for are not decisive against granting leave.<sup>4</sup> In one case a delay of two months after the complainant became aware of the necessity of filing the bill was held not unreasonable under the circumstances.<sup>5</sup> Where the defendant filed an answer and took no further step in the cause for twenty-three years, leave to file a supplemental bill was refused.<sup>6</sup>

**§ 503. Discretion of the court not reviewable.**—The application to file a supplemental bill, like an application to amend, is ordinarily addressed to the discretion of the court, the exercise of which will not be disturbed on appeal.<sup>7</sup> Under the present system in New York it was said by the court of appeals to be “well settled that an order allowing or refusing leave to serve a supplemental complaint is a matter within the discretion of the Supreme Court, as that discretion may finally be exercised by the general term, and it is not the subject of review in this court.”<sup>8</sup>

**§ 504. Effect of filing without leave.**—Where a supplemental bill has been filed without leave and no objection is taken, it will be considered as waived by a voluntary appearance and demurrer by the defendant;<sup>9</sup> although the court

<sup>1</sup> *Eager v. Price*, 2 Paige, 333; *Walker v. Hallett*, 1 Ala. 379. See, however, *Fleischmann v. Bennett*, 79 N. Y. 579; *Graves v. Miles*, Harring. Ch. 332.

<sup>2</sup> *Eager v. Price*, 2 Paige, 33.

<sup>3</sup> *Bogardus v. Trinity Church*, 4 Sandf. Ch. 369.

<sup>4</sup> *Oregon & Trans. Co. v. Northern Pac. R. Co.*, 32 Fed. Rep. 428. The rule referred to is Equity Rule 57.

<sup>5</sup> *Miller v. Clark*, 49 Fed. Rep. 695.

<sup>6</sup> *Woodroff v. Brugh*, 6 N. J. Eq.

465. See, also, in respect of delay, *Ashuelot R. Co. v. Cheshire R. Co.*, 59 N. H. 409.

<sup>7</sup> *Turner v. Berry*, 8 Ill. 541,—“although not universally so,” said the court. The general rule, as stated, would probably be followed in the federal courts. See § 437, *supra*.

<sup>8</sup> *Farmers' L. & T. Co. v. Bankers' &c. Tel. Co.*, 109 N. Y. 342, citing *Fleischmann v. Bennett*, 79 N. Y. 579.

<sup>9</sup> *Allen v. Taylor*, 3 N. J. Eq. 435. The objection is not a ground of de-

may, in its discretion, dismiss it on that ground.<sup>1</sup> So if the defendant answers the supplemental bill he cannot take the objection of irregularity at the hearing.<sup>2</sup>

**§ 505. Frame of a supplemental bill.**—A supplemental bill must state the original bill and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event and the consequent alteration with respect to the parties.<sup>3</sup> It is not the practice to reiterate substantively in a supplemental bill all the charges of the original bill, but to set them out by way of reference and charge the new and additional facts by way of supplement.<sup>4</sup> “You may in the supplemental bill state that you made such a representation in the former bill instead of representing the facts in the second bill.”<sup>5</sup> Even where a supplemental bill is filed against a new defendant it is not necessary to state more of the case than is sufficient to show an equity against him.<sup>6</sup> A supplemental bill to perpetuate testimony upon the discovery of new facts after filing the original bill must state what the facts are.<sup>7</sup> The prayer

murrer but for a motion to dismiss, which rests in discretion. *Henry v. Travelers' Ins. Co.*, 45 Fed. Rep. 299, 803; *Mackintosh v. Flint & Co. R. Co.*, 84 Fed. Rep. 582; *Secor v. Singleton*, 41 Fed. Rep. 725. See, also, *Bowie v. Minter*, 2 Ala. 406; *Hyer v. Caro*, 17 Fla. 382.

<sup>1</sup> *Barriclo v. Trenton Mut. & Co. Ins. Co.*, 18 N. J. Eq. 155. See, also, cases cited in the preceding note.

<sup>2</sup> *Hoffman's Ch. Pr.* (2d ed.) 405; *Walker v. Hallett*, 1 Ala. 879; *Belcher v. Pearson*, Rolla, July 18, 1782, cited in *Mitford*, 284. A party in contempt cannot object after final decree. *Walker v. Hallett*, *supra*.

<sup>3</sup> *Story's Equity Pleading* (10th ed.), § 843; *Mitford's Eq. Pl.*, by Jeremy, 76.

<sup>4</sup> *Edgar v. Clevenger*, 8 N. J. Eq. 464; *Vigers v. Lord Audley*, 9 Sim. 72. United States Equity Rule 58 provides that “it shall not be necessary in any supplemental bill to set

forth any of the statements in the original suit unless the special circumstances of the case require it.” This is a copy of the English Order 47 in Chancery, of August, 1841, which was simply a re-affirmance of the pre-existing practice. 1 *Foster's Federal Practice* (2d ed.), § 188. But if it sets out the allegations in full, it is not open to demurrer. *Johnson v. Snyder*, 7 How. Pr. 395.

<sup>5</sup> *Lloyd v. Johnes*, 9 Ves. 87. See, also, *Baldwin v. Mackown*, 8 Atk. 817. Misrecitals of the allegations in the original bill cannot change the character of the relief sought by the latter. Both are taken as constituting but one bill. *Potier v. Barclay*, 15 Ala. 439.

<sup>6</sup> *Vigers v. Lord Audley*, 9 Sim. 72.

<sup>7</sup> *Knight v. Knight*, 4 Mad. 1. See *Attorney-General v. Fishmongers' Co.*, 4 My. & Craig, 1.

of a supplemental bill must be adapted to the object for which it is exhibited; and it always concludes with praying the process of the court in the usual form.<sup>1</sup> It should also be signed by counsel.<sup>2</sup>

**§ 506. Parties to supplemental bills.**—Where a supplemental bill is filed for the mere purpose of bringing a party before the court upon the original facts appearing upon the record, it is only necessary to make him a defendant in such bill.<sup>3</sup> But where the purpose is to bring new matter before the court based upon new facts, all of the original parties should be made parties to the supplemental bill,<sup>4</sup> except a merely formal party to the original bill whose rights or interests are not affected by the new matter.<sup>5</sup> Where a person acquires the interest of a party in the suit *pendente lite*, and thereupon files a supplemental bill, he must make all the parties to the original bill, whether complainants or defendants, parties to his supplemental bill.<sup>6</sup> In the federal courts a supplemental bill may be maintained without regard to the citizenship of the parties thereto.<sup>7</sup>

**§ 507. Process upon supplemental bills.**—If a party to the original bill does not voluntarily appear to a supplemental bill, the complainant must proceed by subpoena to compel an appearance to the same.<sup>8</sup> A different rule obtains in the fed-

<sup>1</sup> 2 Daniell's Ch. Pr. 1680. But see *Shaw v. Bill*, 95 U. S. 10, holding that no subpoena need be issued against parties to the original bill.

<sup>2</sup> 2 Daniell's Ch. Pr. (2d Am. ed.) 1680.

<sup>3</sup> *Farmers' L. & T. Co. v. Seymour*, 9 Paige, 538; *Ensworth v. Lambert*, 4 Johns. Ch. 605; *McGown v. Yerks*, 6 Johns. Ch. 450; *Brown v. Martin*, 8 Atk. 217; *Dyson v. Morris*, 1 Hare, 413; *Wilkinson v. Fowkes*, 9 Hare, 193; *Hoffman's Ch. Pr.* (2d ed.) 404.

<sup>4</sup> *Farmers' L. & T. Co. v. Seymour*, 9 Paige, 538; *Blunt v. Hay*, 4 Sandf. Ch. 362; *Jones v. Jones*, 8 Atk. 217; *Jones v. Howells*, 2 Hare, 342.

<sup>5</sup> *Allen v. Taylor*, 8 N. J. Eq. 435;

*Bignall v. Atkins*, 6 Mad. 369, and cases cited in the first note to this section. It is too late at the hearing to object for want of parties. *Jones v. Jones*, 8 Atk. 217.

<sup>6</sup> *Borst v. Poyd*, 8 Sandf. Ch. 502. See, also, *Feary v. Stephenson*, 1 Beav. 42.

<sup>7</sup> § 35, *supra*; *Miller v. Rogers*, 29 Fed. Rep. 401. See, also, *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 38 Fed. Rep. 689; *Adams Express Co. v. Denver &c. Ry. Co.*, 16 Fed. Rep. 712; §§ 34, 35, *supra*, on ancillary jurisdiction generally.

<sup>8</sup> 2 Barbour's Ch. Pr. (2d ed.) 74; *Lawrence v. Bolton*, 8 Paige, 294, holding, however that the irregu-

eral courts. There no process of subpoena is necessary unless new parties are brought in. A rule upon parties already served to answer the supplemental bill is sufficient.<sup>1</sup>

**§ 508. Proceedings on supplemental bills — Demurrers and pleas.**— If it appears upon the face of the supplemental bill that the whole of the matters charged therein arose previous to the commencement of the suit, and that the situation of the cause was such that they might have been inserted in the original bill by amendment, the defendant may demur.<sup>2</sup> But if it does not distinctly appear by the supplemental bill that the new matters charged therein arose before the filing of the original bill, the defendant can only take advantage of the irregularity by a plea alleging the fact.<sup>3</sup> If a supplemental bill is filed without any sufficient grounds, the defendant may demur.<sup>4</sup> An objection that the supplemental bill states a new and distinct cause of action should be made by demurrer, and is waived by going to a hearing before the master upon the merits.<sup>5</sup> The defendant may demur to a supplemental bill claiming the same matter as in the original bill, but upon a title totally distinct.<sup>6</sup> And so where the supplemental bill is filed upon matter arising subsequent to the time of filing the original bill, against a person who claims no interest out of the matters in litigation by the former bill, such person may demur.<sup>7</sup> Demurrers and pleas to supplemental bills are subject to the same rules, both with respect

larity of omitting to take out a subpoena is waived where the defendant applies for further time to answer.

<sup>1</sup> *Shaw v. Bill*, 95 U. S. 10. See *French v. Stewart*, 22 Wall. 238.

<sup>2</sup> *Stafford v. Howlett* (1828), 1 Paige, 200, 201; *Colclough v. Evans*, 4 Sim. 76; *Henry v. Travelers' Ins. Co.*, 45 Fed. Rep. 299. The objection comes too late at the hearing. *Lewellen v. Mackworth*, 2 Atk. 40; *McElwain v. Willis*, 3 Paige, 505. United States Equity Rule 57 provides that if leave is granted to file a supplemental bill "the defendant shall demur, plead or answer thereto on the next succeeding rule-day after the supple-

mental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court."

<sup>3</sup> *Stafford v. Howlett*, 1 Paige, 200.

<sup>4</sup> *Lawrence v. Bolton*, 3 Paige, 294; *Milner v. Harewood*, 17 Ves. 143; *Fulton Bank v. New York &c. Canal Co.*, 4 Paige, 127, holding that the objection may be taken by demurrer, plea or answer, but comes too late at the hearing. But see, on the latter point, *Eager v. Price*, 2 Paige, 334.

<sup>5</sup> *Pinch v. Anthony*, 10 Allen, 471.

<sup>6</sup> *Tonkin v. Lethbridge*, Cooper, 83.

<sup>7</sup> *Barbour's Ch. Pr.* (2d ed.) 76. See, also, *Baldwin v. Mackown*, 3 Atk. 817.

to their form and substance, and to the practice arising upon them, as demurrers and pleas to original bills.<sup>1</sup>

§ 509. The same subject continued — Answer.— The form of an answer to a supplemental bill and the manner of putting it in, etc., are the same as in the case of an answer to the original bill, and are subject to the same contingencies.<sup>2</sup> If there is matter properly subject to demurrer or plea the defendant may by his answer claim the same benefit of it as if he had set it up by demurrer or plea.<sup>3</sup> Where a defendant to a supplemental bill is called upon to answer the original bill at the same time that he answers the supplemental matter, the usual course is to include the answer to both bills in the same pleading;<sup>4</sup> but it is not absolutely irregular to separate them.<sup>5</sup> After the answer has been put in and the proceedings on the supplemental bill have arrived at the same point at which the original bill stood, they then proceed *pari passu*, together.<sup>6</sup> When the two suits proceed as one cause, orders and papers are entitled “A. B., complainant; C. P. and E. F., respondents — by original and supplemental bills.”<sup>7</sup> If no proof is made of the supplemental matter the bill will be dismissed at the hearing.<sup>8</sup> Where a supplemental bill is filed before a decree on the original bill, both bills are heard together; if after a decree, then the cause is heard upon the supplemental bill only.<sup>9</sup>

§ 510. The same subject continued — Replication and evidence.— A replication may be filed by the complainant in a supplemental suit to the defendant's answer, if one is put in, in the same manner as in the case of an original suit. But a separate replication in a supplemental suit is only necessary

<sup>1</sup> 2 Daniell's Ch. Pr. (2d Am. ed.) 1681, 1682; Secor v. Singleton, 41 Fed. Rep. 725.

<sup>2</sup> 2 Barbour's Ch. Pr. (2d ed.) 78; 2 Daniell's Ch. Pr. (2d Am. ed.) 1681, 1682.

<sup>3</sup> 2 Barbour's Ch. Pr. (2d ed.) 78.

<sup>4</sup> Vigers v. Lord Audley, 9 Sim. 408.

<sup>5</sup> Sayle v. Graham, 5 Sim. 8.

<sup>6</sup> Lube's Eq. Pl. 188.

<sup>7</sup> John v. Brown, Seaton on Decrees, 885.

<sup>8</sup> Bagnal v. Bagnal, 2 Eq. Ab. 173; s. c., 6 Bro. P. C. 86.

<sup>9</sup> Adams v. Dowding, 2 Mod. 61.

Where the two causes are heard together the decree is in form, “that it is in the original cause ordered, etc., and on the supplemental bill it is ordered, etc.” Hoffman's Ch. Pr. (2d ed.) 406.

where there has been already a replication in the original suit. Where there has been no replication in the original suit, a general replication will apply to the whole record and not merely to the original bill.<sup>1</sup> A supplemental suit being merely a continuation of the original, whatever evidence was properly taken in the latter may be used in both, even though not entitled in the supplemental suit.<sup>2</sup> But evidence of fraud taken under an original bill was held inadmissible as to defendants brought in by supplemental bill only charging them with a knowledge of the pendency of the original suit.<sup>3</sup> And where the case made by a supplemental bill cannot stand as against defendants thereby made parties without the evidence under the original bill, which is inadmissible as to them, and no advantage can accrue to the complainants from the supplemental bill, the new defendant will not be required to answer it, but the bill will be dismissed.<sup>4</sup>

§ 511. Original bills in the nature of supplemental bills.—A supplemental bill is said to be properly applicable only to cases where the same parties or the same interests remain before the court.<sup>5</sup> But where relief of a different kind or upon a different principle is required from that in the original bill or decree, an original bill in the nature of a supplemental bill may be filed.<sup>6</sup> Thus where a sole complainant, suing in his own right, transfers his whole interest in the subject-matter of the litigation, the complainant, being no longer able to prosecute the suit for want of interest, and his assignee claiming by a title which may be litigated, the benefit of the former proceedings cannot be obtained by a mere supplemental bill, but must be sought by an original bill in the nature of a supplemental bill.<sup>7</sup> The same result follows

<sup>1</sup> Catton v. Earl of Carlisle, 5 Mad. 427.

<sup>2</sup> Giles v. Giles, 1 Keen, 685; Turrell v. Spaeth, 9 Off. Gaz. 1168. See, also, Garth v. Wood, 2 Atk. 174.

<sup>3</sup> Stover v. Wood, 26 N. J. Eq. 57.

<sup>4</sup> Stover v. Wood, 26 N. J. Eq. 57.

<sup>5</sup> Story's Equity Pleading, § 845.

<sup>6</sup> Story's Equity Pleading (10th ed.), § 851b. The proceedings upon the bill are the same as upon original

bills in general. <sup>8</sup> Barbour's Ch. Pr. (2d ed.) 86. A supplemental bill should be used in preference to an original bill whenever it can equally subserve the purposes of justice. Allen v. Taylor, 3 N. J. Eq. 485.

<sup>7</sup> Fulton v. Gracen, 44 N. J. Eq. 444.

It was there said that the difference between an original bill in the nature of a bill of revivor, and an original bill in the nature of a sup-



where a sole plaintiff suing in his own right is deprived of his whole interest in the matters in question by an event subsequent to the institution of the suit, as in the case of a bankrupt or insolvent debtor whose whole property is transferred to assignees.<sup>1</sup>

**§ 512. The same subject continued — Frame of the bill.**— An original bill in the nature of a supplemental bill must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person who has become entitled. It must then show the ground upon which the court ought to grant the benefit of the former suit to or against the person who has become so entitled; and it must pray the decree of the court, adapted to the case of the plaintiff in the new bill.<sup>2</sup>

**§ 513. Original bill in the nature of a bill of revivor.**— If a suit becomes abated, and nothing but the death of the

plemental bill, is this: Under the former the defendant is absolutely bound by the former proceedings in the cause, but under the latter he has a right to avail himself of any new equity or defense which has arisen since the original bill was filed, or which he may have a right to urge against the new party coming into the litigation, but which did not exist against the original complainant. In *Campbell v. City of New York*, 85 Fed. Rep. 14, a similar case, Judge Wallace said that "although the distinction between supplemental bills and original bills seems to rest upon purely artificial reasons, it is well recognized and is attended in practice with consequences which affect the substantial rights of parties." See, also, *Zinc Co. v. Franklinton Co.*, 18 N. J. Eq. 832, 847; *Tappan v. Smith*, 5 Biss. 73; *Bowie v. Minter*, 2 Ala. 406; *Butler v. Cunningham*, 1 Barb. 85. A judgment debtor appealed from the judgment which was affirmed and the surety

on the appeal bond paid it. The surety then levied execution upon land occupied by the debtor in another county, and in aid of such execution filed what he called a "supplemental bill" in the county where the judgment was rendered. This bill averred that the land levied on had been paid for by the judgment debtor, but that the title had been fraudulently conveyed to others who were made parties and against whom a decree was asked. All the defendants resided in the county where the land was situated. It was held that the bill was not a supplemental bill, but an original bill in the nature of a supplemental bill, and that it should have been filed in the county where the defendants resided. *McDonald v. Asay*, 139 Ill. 128; s. c., 27 N. E. Rep. 929.

<sup>1</sup> Story's Equity Pleading (10th ed.), § 349. See *Lee v. Lee*, 1 Hare, 621; *Robertson v. Southgate*, 5 Hare, 228.

<sup>2</sup> Story's Equity Pleading (10th ed.), § 358; Mitford's Eq. Pl., by Jeremy, 99.

party is necessary to be established to show the title to revive, a simple bill of revivor is sufficient; but where there are other facts which may be brought into litigation besides the mere representative character of the new party, an original bill in the nature of a bill of revivor must be filed.<sup>1</sup> Where by the event which abates a suit the interest of a party is transmitted by devise or otherwise, so that the title to the property as well as the person entitled thereto may be a subject of litigation in the suit, an original bill in the nature of a bill of revivor is necessary.<sup>2</sup> Thus if the complainant in a suit brought to set aside a conveyance of land dies, leaving a will devising the land in controversy, and the devisee seeks to revive the original suit, he can only do it in that mode which will give the heirs at law an opportunity to dispute the validity of the will. For such purpose an original bill in the nature of a bill of revivor is the appropriate process.<sup>3</sup> The ground of the distinction between bills of revivor and bills in the nature of bills of revivor is that the former, in case of death, are founded upon mere privity of blood or representation by operation of law; the latter upon privity of estate or title by the act of the party.<sup>4</sup> The bill is said to be original merely for want of that privity of title between the party to the former bill and the party to the latter, although claiming the same interest, which would have permitted the continuance of the suit by a bill of revivor.<sup>5</sup> Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill will be equally bound by, or have the advantage of, the proceedings on the original bill as if there had been such a privity between him and the party to the original bill, claiming the same interest.<sup>6</sup> The suit is con-

<sup>1</sup> Story's Equity Pleading (10th ed.), § 877 *et seq.*; *Ross v. Hatfield*, 2 N. J. Eq. 868; *Mitford's Eq. Pl.*, ch. 1, § 8.

<sup>2</sup> *Douglass v. Sherman*, 2 Paige, 858; *Story's Equity Pleading* (10th ed.), § 878.

<sup>3</sup> *Lyons v. Van Riper*, 26 N. J. Eq. 337. See, also, *Spier v. Robinson*, 9 How. Pr. 825; *Wilkinson v. Parish*, 3 Paige, 653; *Slack v. Walcott*, 8 Mason, 508; *Anderson v. McNeal*, 4 Lea, 303.

<sup>4</sup> *Story's Equity Pleading* (10th ed.), § 879.

<sup>5</sup> *Mitford's Eq. Pl.*, by Jeremy, 97, 98; *Story's Equity Pleading* (10th ed.), § 880.

<sup>6</sup> *Mitford's Eq. Pl.*, by Jeremy, 97, 98; *Story's Equity Pleading*, § 880. After a decree in favor of an administrator, an administrator *de bonis non* can revive the suit only by a bill of this nature. *Story's Equity Pleading* (10th ed.), 882. See *Phelps v.*

sidered as pending from the filing of the original bill so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and to have every other advantage which would have attended the institution of the suit by the original bill if it could have been continued by a bill of revivor merely.<sup>1</sup>

**§ 514. The same subject continued — Frame of bill — Proceedings.**— An original bill in the nature of a bill of revivor should generally state the same facts as a bill of revivor. It should state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the deceased party has been transmitted. It should also charge the validity of the transmission, and state the rights which have accrued by it.<sup>2</sup> The bill should also pray that the suit may be revived, and the plaintiff have the benefit of all the former proceedings thereon.<sup>3</sup> The practice as to demurring, pleading to and answering bills of this nature is the same in all respects as the practice upon original bills.<sup>4</sup> They are brought to a hearing in the same manner as original bills, a revivor being obtained only by decree and not by an order to revive, as in the case of an ordinary bill of revivor.<sup>5</sup>

**§ 515. Bill of revivor and supplement.**— A bill of revivor and supplement is a compound of a supplemental bill and a bill of revivor, and not only continues the suit which has

Sproale, 4 Sim. 318; *Stuart v. Burrowes*, Drury (Irish), 265. It can be maintained only by some person who claims in privity with the complainant in the original bill. *Oldham v. Eboral*, Coop. Sel. Cas. 27; *Rylands v. Latouche*, 2 Bligh, 585; *Tonkin v. Lethbridge*, Coop. 48. In the federal courts such a bill may be maintained irrespective of the citizenship of the representative, provided the requisite diversity of citizenship existed between the parties in the original suit. See §§ 84, 85, *supra*; *Hone v. D'Alon*, 20 Fed. Rep. 465; *Minnesota Co. v. St. Paul Co.*, 2 Wal. 609; *Clarke v.*

*Mathewson*, 12 Pet. 164; s. c., 2 Sumner, 262; 1 Foster's Federal Practice (2d ed.), § 182.

<sup>1</sup> Mitford's Eq. Pl., by Jeremy, 97, 98; Story's Equity Pleading (10th ed.), § 380.

<sup>2</sup> *Phelps v. Sproule*, 4 Sim. 183; Mitford's Eq. Pl., by Jeremy, 97; Story's Equity Pleading (10th ed.), § 386.

<sup>3</sup> Story's Equity Pleading (10th ed.), § 386.

<sup>4</sup> 2 Daniell's Ch. Pr. (2d Am. ed.) 1720, 1721.

<sup>5</sup> 2 Barbour's Ch. Pr. (2d ed.) 408.

abated by the death of a party, but supplies any defects in the original bill arising from subsequent events.<sup>1</sup> If a suit becomes abated, and by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement<sup>2</sup> or a devise, under certain circumstances,<sup>3</sup> although a bill of revivor merely may continue the suit, so as to enable the parties to prosecute it, yet to bring before the court the whole matter necessary for its consideration the parties must, by supplemental bill, added to and made part of the bill of revivor, show the settlement or devise, or other act by which their rights are affected. And in the same manner, if any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the court, either to show the rights of the parties or to obtain the full benefit of the suit beyond what is merely necessary to show by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill added to the bill of revivor.<sup>4</sup> This species of bill must be framed and proceeded upon in the same manner as bills of revivor or supplemental bills, and is subject to the same defenses as each of those bills.<sup>5</sup> The case must be set down for hearing against all the parties, although the bill is only a bill of revivor against one and an order to revive has been obtained.<sup>6</sup>

<sup>1</sup> *Westcott v. Cady*, 5 Johns. Ch. 334. It does not cure a defect apparent upon the face of the original bill. *Bampton v. Birchall*, 5 Beav. 330; s. c., 1 Phil. 568. Whenever a complainant has a right to revive a suit, he may add to the bill of revivor such supplemental matter as is proper to be added. *Pendleton v. Fay*, 8 Paige, 204.

<sup>2</sup> *Merryweather v. Mellish*, 18 Ves. 161.

<sup>3</sup> *Rylands v. Latouche*, 3 Bligh, 566.

<sup>4</sup> *Mitford's Eq. Pl.*, by Jeremy, 70, 71; *Russell v. Sharp*, 1 Ves. & B.

500; *Story's Equity Pleading* (10th ed.), § 387.

<sup>5</sup> *Story's Equity Pleading* (10th ed.), §§ 387, 627. If any matters contained in a bill of revivor and supplement are irrelevant and improper, the defendant may avail himself of the objection, either by a plea or by demurrer, or by exceptions for impertinence. *Pendleton v. Fay*, 8 Paige, 204. But the demurrer should go to the supplemental matter and not to the whole bill. *Randolph v. Dickerson*, 5 Paige, 517.

<sup>6</sup> *Lake v. Austwick*, 4 Jur. 314.

## CHAPTER XVI.

### EVIDENCE.

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| <p>§ 516. General rules of evidence in equity.</p> <p>517. Judicial notice.</p> <p>518. Judicial notice in the federal courts.</p> <p>519. Bill in another suit as evidence.</p> <p>520. Method of taking testimony — Federal rules.</p> <p>521. Time for taking testimony in federal courts.</p> <p>522. Production of documents by a defendant.</p> <p>523. The same subject continued.</p> <p>524. Production of documents by the plaintiff.</p> <p>525. Subpoena <i>duces tecum</i> against persons not parties.</p> <p>526. The same subject continued.</p> <p>527. Subpoena <i>duces tecum</i> against parties.</p> <p>528. Inspection of documents on subpoena <i>duces tecum</i>.</p> <p>529. Inspection before trial.</p> <p>530. Inspection in aid of proof.</p> <p>531. Interlocutory order involving inspection.</p> <p>532. Stipulations relating to evidence.</p> | <p>§ 533. The same subject continued.</p> <p>534. Bills of discovery.</p> <p>535. The same subject continued.</p> <p>536. Commissions to take testimony.</p> <p>537. Depositions <i>de bene esse</i> under acts of congress.</p> <p>538. Objections to evidence.</p> <p>539. The same subject continued.</p> <p>540. Objections to competency of witnesses.</p> <p>541. Compelling a witness to answer.</p> <p>542. Return of depositions.</p> <p>543. Admissibility of depositions without cross-examination.</p> <p>544. Right of a party to suppress depositions.</p> <p>545. Re-examination of witnesses.</p> <p>546. The same subject continued.</p> <p>547. Additional testimony — The general rule.</p> <p>548. The same subject continued — Illustrations.</p> <p>549. The same subject continued — Exceptions to the rule.</p> <p>550. Proof at the hearing.</p> <p>551. The same subject continued.</p> <p>552. Letters rogatory.</p> |
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§ 516. General rules of evidence in equity.—The rules of evidence as to matters of fact are generally the same in equity as at law.<sup>1</sup> The competency of witnesses is governed

<sup>1</sup> 3 Greenleaf on Evidence (15th ed.), § 250; Manning v. Lechmere, 1 Atk. 458; Glynn v. Bank of England, 2 Ves. 41. "There is no rule of evidence better settled than that which declares that parol evidence is inad-

missible to contradict or substantially vary the legal import of a written agreement. Such testimony is not only contrary to the statute of frauds but to the maxims of the common law; and the rules of evidence on

by the same rules in equity as at law.<sup>1</sup> So the rule that the burden of proof rests upon the party who asserts the affirmative is common to courts of equity as well as to courts of law;<sup>2</sup> as also the fundamental maxims that no proof can be admitted of any matter which is not noticed in the pleadings,<sup>3</sup>

this or on most other points are the same in courts of law and of equity." Per Chancellor Kent, in *Stevens v. Cooper*, 1 Johns. Ch. 425, 429, citing *Lake v. Philips*, 1 Ch. Rep. 59; *Binstead v. Coleman*, Bunb. 65; *Parteriche v. Powlet*, 2 Atk. 383; *Irnham v. Child*, 1 Bro. 92; *Portmore v. Morris*, 2 Bro. 219; *Meres v. Ansell*, 3 Wils. 275; *Preston v. Merceau*, 2 Black. Rep. 1249.

<sup>1</sup> *Nash v. Williams*, 20 Wall. 226; 8 Greenleaf on Evidence (15th ed.), § 818. But in equity, where all questions as well of fact as of law are for the court, the fact that a witness testifying as an expert is not properly qualified goes to the weight, and not to the admissibility, of his testimony. *Stegner v. Blake*, 86 Fed. Rep. 188. And see, particularly, where this distinction is admirably elucidated, *Barragne v. Siter*, 9 Ark. 545. United States Revised Statutes, section 858, provides that "in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party or interested in the issue tried; provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of de-

cision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty." In regard to the concluding provision of the section just quoted, see *Brown v. Spofford*, 95 U. S. 474; *Robinson v. Mandell*, 8 Cliff. 169; *Bast v. First Nat. Bank*, 101 U. S. 93; *American E. Const. Co. v. Consumers' Gas Co.*, 47 Fed. Rep. 43, 46; *Richardson v. Hardwick*, 106 U. S. 252; *Conn. Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Sims v. Hundley*, 6 How. 1; *Potter v. National Bank*, 102 U. S. 163; *Goodwin v. Fox*, 129 U. S. 601, 631; *McNiel v. Holbrook*, 12 Pet. 84; 1 Foster's Federal Practice (2d ed.), § 274.

<sup>2</sup> 2 Daniell's Ch. Pr. (1st ed.) 408; *Eyre v. Dolphin*, 2 Ball & B. 303; *Saunders v. Leslie*, 2 Ball & B. 515. See for exceptions in cases involving fiduciary and confidential relations, 8 Greenleaf on Evidence (15th ed.), § 258.

<sup>3</sup> 2 Daniell's Ch. Pr. (1st ed.) 410, 411; *Whaley v. Norton*, 1 Vern. 483; *Gordon v. Gordon*, 3 Swanst. 472; *Clarke v. Turton*, 11 Ves. 240; *Wilbains v. Llewellyn*, 2 Y. & J. 68; *Hall v. Maltby*, 6 Price, 240; *Montesquieu v. Sandys*, 18 Ves. 302; *Powys v. Mansfield*, 6 Sim. 565; *Miller v. Miller*, 1 N. J. Eq. 386. See, also, §§ 99, 100, *supra*. And for further expositions of the rule, 8 Greenleaf on Evidence (15th ed.), § 356; *Smith v. Clarke*, 12 Ves. 477, 480; *Sidney v. Sidney*, 3 P. Wms. 269, 276; *Clark v. Periam*, 2 Atk. 337; *Carew v. Johnston*, 2 Sch. & Lef. 280; *Wheeler v. Trotter*, 3

and that the substance of the case made by each party must be proved.<sup>1</sup>

**§ 517. Judicial notice.**— What is judicially known to the court need not be proved, and averments in pleadings in opposition to such facts will be disregarded on demurrer.<sup>2</sup> Judicial notice will be taken of the political divisions of a State, such as counties and towns, and of its general geography;<sup>3</sup> but not, it is said, of the local situation, and the distance of different places in a county from each other.<sup>4</sup> In a State court the laws of another State must be proved as any other fact.<sup>5</sup> Judicial notice will be taken by a State court of who are the judges of the various courts of record of the State and of their terms of office and the organization and jurisdiction of such courts;<sup>6</sup> and the court will of its own motion advise itself so as to verify matters of which it is required to take judicial notice.<sup>7</sup>

Swanst. 174, n.; *Matthew v. Hanbury*, 2 Vern. 187. "I do not mean to be understood as expressing an opinion that no evidence can be put in which is not alleged or specifically described in the bill; but there must be in the bill allegations broad enough to cover any evidence offered before it becomes admissible. After that confessions or declarations or documents or cumulative facts are admissible to support any allegations to which they apply; and such allegations are alone often sufficient to render the introduction of such evidence proper." Per Woodbury, J., in *Nesmith v. Calvert*, 1 W. & M. 34, 44; *Smith v. Burnham*, 6 Sumn. 613; *Jenkins v. Eldredge*, 3 Story, 181.

<sup>1</sup> 2 Daniell's Ch. Pr. (1st ed.) 419; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Mortimer v. Orchard*, 2 Ves. Jr. 243; *Legh v. Haverfield*, 5 Ves. 453; *Wooliam v. Hearn*, 7 Ves. 222; *Deniston v. Little*, 2 Sch. & Lef. 11, n.; *Savage v. Carroll*, 2 Ball & B. 451; *Daniels v. Davison*, 16 Ves. 249; *Dean &c. of*

*Ely v. Warren*, 2 Atk. 199; *Appeal of Ahl (Pa.)*, 18 Atl. Rep. 477.

<sup>2</sup> Gibson's Suits in Chancery, § 452; 1 Daniell's Ch. Pr. (5th ed.) 546.

<sup>3</sup> Gibson's Suits in Chancery, § 452. As, for instance, its large lakes, rivers and mountains. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

<sup>4</sup> *Deybel's Case*, 4 B. & Ald. 243; 1 Daniell's Ch. Pr. (5th ed.) 546, n. 6.

<sup>5</sup> *Bagwell v. McTighe*, 1 Pickle, 618; *Templeton v. Brown*, 2 Pick. 53.

<sup>6</sup> *Vahle v. Brackensieck (Ill.)*, 34 N. E. Rep. 825; *Russell v. Sargent*, 7 Ill. App. 98; *Ellsworth v. Moore*, 5 Iowa, 486; *Upton v. Paxton*, 72 Iowa, 295; *Tucker v. State*, 11 Md. 322; *Ex parte Peterson*, 33 Ala. 74; *Kilpatrick v. Com.*, 81 Pa. St. 198. See, also, *Newell v. Newton*, 10 Pick. 470; *Ripley v. Warren*, 2 Pick. 592; *Hawkes v. Kennebeck*, 7 Mass. 461; *Woods v. Fitz*, 10 Martin, 196; *Despau v. Swindles*, 3 Martin (N. S.), 705.

<sup>7</sup> *City of Rock Island v. Cuinely*, 126 Ill. 408. Judicial notice will be taken of "the officials of the county



§ 518. **Judicial notice in the federal courts.**—The courts of the United States take judicial notice of all the public statutes of the several States,<sup>1</sup> and of the laws which prevailed in territory acquired by the United States previous to its acquisition,<sup>2</sup> and of executive regulations made in pursuance of an act of congress which are to have the force of statutes,<sup>3</sup> and of the ports and waters of the United States in which the tide ebbs and flows,<sup>4</sup> and of the boundaries of the several States and judicial districts.<sup>5</sup> The court will not take judicial notice that a patent is void on its face for want of patentable novelty when it has the slightest doubt that such is the fact.<sup>6</sup> The United States circuit court of appeals will not take judicial notice of what may appear upon the records of district and circuit courts within the boundaries of the circuit.<sup>7</sup>

§ 519. **Bill in another suit as evidence.**—A complaint not under oath, nor signed by the complainant but only by his

where the court is sitting; the religion and general customs of the people; their language and the meaning of words; the rules of grammar and arithmetic; and a great multitude of other matters of which every well-informed citizen of the State is presumed to know." Gibson's Suits in Chancery, § 452. See, also, 1 Greenleaf on Evidence, §§ 4-6a; Story's Equity Pleading (10th ed.), § 29; 1 Daniell's Ch. Pr. (5th ed.) 546.

<sup>1</sup> Gormley v. Bunyan, 188 U. S. 628. "Of all the laws and jurisprudence of the several States in which they exercise an original or appellate jurisdiction." Story's Equity Pleading (10th ed.), § 24; Owings v. Hull, 9 Peters, 607, 624, 625. Foreign laws written or unwritten must be proved as facts. Dickerson v. Matheson, 50 Fed. Rep. 78; Pierce v. Indseth, 106 U. S. 546; Ennis v. Smith, 14 How. 400, 426.

<sup>2</sup> United States v. Perot, 98 U. S. 428.

<sup>3</sup> United States v. Williams, 6 Mont. 879; s. c., 12 Pac. Rep. 851. But not

of the filing by a railroad company of a map of its route with the secretary of the interior. That is an act of the party, not an executive act, although it is indorsed "filed" and thereby becomes a record of the department; of such records the court does not take judicial notice. M'Kevin v. Northern Pac. R. Co., 45 Fed. Rep. 464, 467.

<sup>4</sup> United States v. La Vengeance, 2 Dall. 297; The Apollon, 9 Wheat. 874; The Thomas Jefferson, 10 Wheat. 428; Peyroux v. Howard, 7 Peters, 842, 843.

<sup>5</sup> Story's Equity Pleading (10th ed.), § 24.

<sup>6</sup> Bottle Seal Co. v. De La Vergne & Co., 47 Fed. Rep. 59; Lalance & Co. Mfg. Co. v. Mosheim, 48 Fed. Rep. 452; citing Blessing v. Copper Works, 84 Fed. Rep. 758; Eclipse Co. v. Adkins, 86 Fed. Rep. 554; Standard Oil Co. v. Southern Pac. Co., 42 Fed. Rep. 295; New York B. & P. Co. v. New Jersey & Co., 187 U. S. 445; s. c., 11 S. Ct. Rep. 193.

<sup>7</sup> Fitzgerald v. Evans (C. C. A.), 49 Fed. Rep. 426.

attorneys, is incompetent in a suit by the same complainant against another party as an admission by the complainant that he has no cause of action.<sup>1</sup> But the statements in a sworn bill in equity are competent, though not conclusive, evidence against the complainant therein in another suit between the same parties.<sup>2</sup>

**§ 520. Method of taking testimony — Federal rules.**— According to the ancient and regular practice of courts of chancery, the testimony of witnesses in equity causes is taken secretly and in writing, this constituting the most material difference between proceedings in equity and at common law.<sup>3</sup> In most of the States, at the present day, the statutes provide for the trials of fact in chancery cases by witnesses examined orally in open court, or by depositions, taken in the same manner and for the same causes as at law.<sup>4</sup> The United States Revised Statutes provide that “the mode of

<sup>1</sup> Delaware County v. Diebold Safe Co., 188 U. S. 478, 487. See, also, Combs v. Dodge, 31 How. 897; Pope v. Allis, 115 U. S. 868; Dennie v. Williams, 185 Mass. 28, and cases cited in the following note.

<sup>2</sup> Elliott v. Hayden, 104 Mass. 180, where Justice Gray said: — “As no action of the court was obtained upon the bill in equity, the statements therein, if they had not been made upon oath of the plaintiffs, might have been considered as mere suggestions of the counsel and incompetent evidence of the admissions of the parties. Boileau v. Rutlin, 2 Exch. 665; Combs v. Hodge, 31 How. 897; Church v. Shelton, 2 Curt. C. C. 271. But being upon oath of the parties in whose behalf the bill was filed, they are competent evidence as solemn admissions by them in person of the truth of the facts stated — upon the same ground upon which sworn answers and pleas in chancery or allegations concerning the substance of the action in a declaration at common law have been held ad-

missible in evidence in another suit. Taylor on Evidence (5th ed.), §§ 759, 1560; Central Bridge Co. v. Lowell, 15 Gray, 106, 122; Bliss v. Nichols, 12 Allen, 448, 446, and cases cited; Boston v. Richardson, 18 Allen, 146, 162. It would, of course, be open to the parties to show that they were made under a mistake.” See, also, Doe v. Sybourn, 7 Term R. 2; Vaneman v. Swedesboro L. & B. Ass’n, 42 N. J. Eq. 268; s. c., 7 Atl. Rep. 676; Handeside v. Brown, 1 Dick. 286; Blanks v. Klein, 58 Fed. Rep., 486.

<sup>3</sup> 8 Greenleaf on Evidence (15th ed.), § 251.

<sup>4</sup> See Greenleaf on Evidence (15th ed.), §§ 258, 259. A party cannot demand an examination in open court until the cause is at issue as to all the parties. Kelly v. Gartner (Mich.), 51 N. W. Rep. 278. Or until those who have not answered have been defaulted. Lumber Co. v. Gustin, 54 Mich. 624; Vermillya v. Odell, 1 Edw. Ch. 617; s. c., 4 Paige, 121; Hastings v. Palmer, 1 Clarke’s Ch. 52.

proof in causes of equity . . . shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided for.”<sup>1</sup>

§ 521. Time for taking testimony in federal courts.—A United States equity rule provides that “three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time.”<sup>2</sup> It seems that in some cases, when proofs are not taken in proper time, they may be filed under certain conditions *nunc pro tunc*.<sup>3</sup> But where no motion for that purpose is made, there is no course for the court but to grant a motion by the opposing party to strike the depositions from the files.<sup>4</sup> A motion for leave to take testimony after the time for taking the same has expired will not be granted upon mere general statements which disclose nothing in regard to the character of the testimony.<sup>5</sup>

§ 522. Production of documents by a defendant.—The word “documents” is in practice considered to comprise all written or printed evidence.<sup>6</sup> The court has inherent authority to order a complainant to produce documents in his possession or control, provided (1) he admits the documents are in his possession or control,<sup>7</sup> and (2) it satisfactorily appears that

<sup>1</sup> U. S. R. S., § 862. By an amendment, at the October term, 1892, of Equity Rule 67, and adopted by the United States circuit court of appeals, it is provided that “Upon due notice, given as prescribed by previous order, the court may, in its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing.”

<sup>2</sup> Equity Rule 69.

<sup>3</sup> Fischer v. Hayes, 19 Blatchf. 25; a. c., 6 Fed. Rep. 76; Coon v. Abbot, 87 Fed. Rep. 98.

<sup>4</sup> Wenham v. Switzer, 48 Fed. Rep. 612.

<sup>5</sup> Streat v. Steinam, 88 Fed. Rep.

548. See Jewett v. Albany City Bank, Clarke's Ch. 57; Boone v. Pierpont, 33 N. J. Eq. 217. A municipal corporation has a much stronger claim for relief herein against the negligence of its counsel than an individual would have. Lewis v. Elizabeth, 25 N. J. Eq. 298.

<sup>6</sup> 2 Daniell's Ch. Pr. (5th ed.) 1820, n. 6; Gibson's Suits in Chancery, § 465, n. 8.

<sup>7</sup> 2 Daniell's Ch. Pr. (5th ed.) 1818; Gibson's Suits in Chancery, § 465; Paine v. Warren, 33 Fed. Rep. 357, 358; Atkins v. Wright, 14 Ves. 211, 213; Princess of Wales v. Earl of Liverpool, 1 Swanst. 128; Somerville v. Mackay, 16 Ves. 382, 387; Uns-

their production is relevant to his case.<sup>1</sup> If the document relates to the defendant's title or right, and contains nothing supporting the title or claim of the plaintiff, the production

worth v. Woodcock, 3 Mad. 482. See, also, Williams v. Williams, 1 Md. Ch. 199; Robbins v. Davis, 1 Blatchf. 288; Jackling v. Edmonds, 3 E. D. Smith (N. Y.), 539; Bell v. Johnson, 1 J. & H. 682; Peyton v. Lambert, 6 Ir. Eq. 9. "Whether the plaintiff is entitled to a production of documents must always be decided upon what appears upon the face of the bill and answer." Langdell's Equity Pleading (2d ed.), § 204, containing a learned and lucid discussion of the subject. The bill must contain a sufficient charge of documents, and that by their production the truth of the bill or of some part thereof will appear. Langdell's Equity Pleading (2d ed.), 205, 206; Atkins v. Wright, 14 Ves. 211; Combe v. Corporation of London, 15 L. J. Ch. 80; Hough v. Martin, 2 Dev. & Bat. 226. And an admission in the answer is necessary. Barbour's Ch. Pr. (2d ed.) 229; Hoffman's Ch. Pr. (2d ed.) 307; 3 Greenleaf on Evidence (15th ed.), § 295. Leave to amend the bill will be given to obtain such an admission. Barnet v. Noble, 1 Jac. & W. 227; Erskine v. Bize, 2 Cox's Cas. 226. As to what constitutes a sufficient admission of possession see Langdell's Equity Pleading (2d ed.), § 211, where it is said that in deciding the question "a very strict rule is applied" in favor of the defendant. Murray v. Wheeler, Cr. & Ph. 114; Watson v. Renwick, 4 Johns. Ch. 884; Gibbons v. Ogden, Halst. Dig. 174; Heeman v. Midland, 4 Mad. 391; Walburn v. Ingilby, 1 Myl. & K. 61; Eager v. Wiswall, 2 Paige, 869; Farquharson v. Balfour, Turn. & Russ. 190; Hornby v. Pemberton, Mosely, 57; McCann v. Breese, 1 Hogan, 129;

Hoffman's Ch. Pr. (2d ed.) 307. As to the sufficiency of the answer as an admission of the relevancy of the document, see Langdell's Equity Pleading (2d ed.), § 212 *et seq.*; Tyler v. Drayton, 2 Sim. & Stu. 309; Newton v. Berresford, Younge, 377; Bannotyne v. Leader, 10 Sim. 230; Smith v. Duke of Beaufort, 1 Hall, 507; Mansell v. Feeney, 2 J. & Hem. 320; Bolton v. Liverpool, 3 Sim. 467.

<sup>1</sup> Langdell's Equity Pleading (2d ed.), § 212; Gibson's Suits in Chancery, § 465; Howard v. Robinson, 5 Jur. (N. S.) 186; Cleft v. Cleft, 3 Pickle, 21. "It must further appear that the plaintiff has an interest in the papers called for," Hoffman's Ch. Pr. (2d ed.) 307; Lingen v. Simpson, 6 Mad. 290; Ingilby v. Shafto, 33 Beav. 31; which, however, may be a common interest with the defendant; Burton v. Neville, 2 Cox's Cas. 242; such as that of a copartner, Pickering v. Rigby, 18 Ves. 484; Hornby v. Pemberton, Mosely, 58; Kelly v. Eckford, 5 Paige, 458; a tenant in common, Hoffman's Ch. Pr. (2d ed.) 310; Barbour's Ch. Pr. (2d ed.) 231; principal and agent, Gerard v. Penswick, 1 Swanst. 534; Earl of Shrewsbury v. Cecil, 1 Cox's Cas. 277; the interest of landlord and tenant, Smith v. Duke of Northumberland, 1 Cox's Cas. 362; Inman v. Hodgson, 1 Young & Jer. 28; Smith v. Alderton, 2 Fowl. Ex. Pr. 60, 1787; the interest of trustees and *cestuis que trust*, Sparke v. Montrion, 1 Y. & Col. 103. The document must be pertinent to the issue. Bischoffsheim v. Brown, 29 Fed. Rep. 341; Potter v. Beal, 50 Fed. Rep. 860, 866.

will be refused. If it relates to the title of both, its production will be ordered.<sup>1</sup>

§ 523. **The same subject continued.**—If a defendant by his answer submits to produce certain documents, such submission is binding upon him, and he will be ordered to produce them as of course;<sup>2</sup> which is enforced by attachment for contempt, issuing on proof of service of the order and of failure to produce as required.<sup>3</sup> Or, when necessary, the court may appoint sequestrators, and order them to seize the documents required to be produced.<sup>4</sup> But the plaintiff's right to inspect documents is only co-extensive with his right to read in evidence. The defendant, therefore, is entitled to seal up

<sup>1</sup> Hoffman's Ch. Pr. (2d ed.) 812; *Sampson v. Sweetenham*, 5 Mad. 16; *Tyler v. Drayton*, 2 Sim. & Stu. 309; *Wilson v. Foster*, 1 McClel. & Y. (Exch.) 274; *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66; *Bettison v. Farrington*, 3 P. Wms. 68; *Attorney-General v. Ellison*, 4 Sim. 238. On a bill for specific performance letters between the partners may be called for. *Preston v. Carr*, 1 Young & Jer. 175; *Garland v. Scott*, 3 Sim. 396. And letters between the parties generally. *Whitbread v. Gurney*, 1 Younge, 541. But not letters between a party and his solicitor. *Bolton v. Corporation of Liverpool*, 3 Sim. 486; *Hughes v. Biddulph*, 4 Russ. 190; *Vent v. Pacey*, 4 Russ. 198. The production of a deed may be ordered on a bill to set it aside as fraudulent. *Comstock v. Apthorpe*, 3 Cowen, 386; *Apthorpe v. Comstock*, 1 Hopk. Ch. 144; *Balch v. Symes*, 1 Turn. & Russ. 87; *Fencott v. Clarke*, 6 Sim. 8; *Kennedy v. Green*, 6 Sim. 6. See *Beckford v. Wildman*, 16 Ves. 438. And the purchase deed of a *bona fide* purchaser for a valuable consideration. Hoffman's Ch. Pr. (2d ed.) 817; *Aston v. Aston*, 3 Atk. 302; *Salkeld v. Science*, 2 Ves. Sr. 107. But see *Anon.*, *Freeman's Rep.* 275. Previous to a

final hearing of a cause the court only orders the production of books and papers upon two principles: security pending the litigation, and discovery or inspection for the purposes of the suit. *Watts v. Lawrence*, 3 Paige, 159; *Lingen v. Simpson*, 6 Mad. 290.

<sup>2</sup> Langdell's Equity Pleading (3d ed.), § 217; *McIntosh v. Great Western Ry. Co.*, 1 Macn. & Gord. 73; *Latimer v. Neate*, 4 Cl. & Fin. 570; *Glover v. Hall*, 2 Ph. 484; *Hardman v. Ellames*, 2 My. & K. 745. With liberty to take copies. *Barbour's Ch. Pr.* (2d ed.) 234; *Hide v. Holmes*, 2 Moll. 372. The document must be produced in the clerk's office and filed by him. <sup>3</sup> Daniell's Ch. Pr. (5th ed.) 1836. The examination may be conducted without the presence of the defendant or his solicitor. <sup>2</sup> *Barbour's Ch. Pr.* (2d ed.) 235. But in the master's office it is the practice to give notice of inspection to the opposite party. Hoffman's Office of Master, 12. See *Hallett v. Hallett*, 2 Paige, 482; *Hart v. Ten Eyck*, 2 Johns. Ch. 513.

<sup>3</sup> Daniell's Ch. Pr. (5th ed.) 1839; *Gibson's Suits in Chancery*, § 465.

<sup>4</sup> Daniell's Ch. Pr. (5th ed.) 1056; *Gibson's Suits in Chancery*, § 465.

(or conceal in any appropriate way) so much of any document produced as he can swear has no relation to the plaintiff's case.<sup>1</sup> This he may do by affidavit when he makes the production, and such affidavit, being in contemplation of law a part of the defendant's answer, and governed by the same rules, is conclusive.<sup>2</sup>

<sup>1</sup> Langdell's Equity Pleading (5th ed.), § 216; Campbell v. French, 2 Cox's Cas. 286; Dias v. Merle, 2 Paige, 594; Gerard v. Penswick, 1 Wils. 222; Earp v. Lloyd, 8 K. & J. 549; Lind v. Isle of Wight Ferry Co., 8 W. R. 540; Robbins v. Davis, 1 Blatchf. 288. See Telford v. Ruskin, 1 Drew. & Sm. 148.

<sup>2</sup> Langdell's Equity Pleading (2d ed.), § 216, n. 1; 2 Daniell's Ch. Pr. (5th ed.) 1824; Napier v. Staples, 2 Moll. 270; Potter v. Beal (C. C. A.), 50 Fed. Rep. 860, 866; Purcell v. Macnamara, Wigram on Discovery, p. 240; Bowers v. Fernie, 8 My. & Cr. 682; Sheffield Canal Co. v. Sheffield & Rotheram Ry. Co., 1 Phil. 484; Mansell v. Feeney, 2 Johns. & H. 820. If the affidavit contains contradictory statements the court may unseal and examine the documents to get at the truth. 2 Daniell's Ch. Pr. (5th ed.) 1824; Caton v. Lewis, 22 L. J. Ch. 946; Lafone v. Falkland Islands Co., 27 L. J. Ch. 25. See, also, Titus v. Cortelyou, 1 Barb. 444. The court will not compel the production of documents violating professional confidence, or those which would tend to subject the defendant to a criminal charge, penalty or forfeiture. 2 Daniell's Ch. Pr. (5th ed.) 1833-1835; Rice v. Gordon, 18 Sim. 580; Waters v. Earl of Shaftesbury, 12 Jur. (N. S.) 8; Wynne v. Humbertson, 27 Beav. 421; Ford v. De Pontes, 5 Jur. (N. S.) 998; Marsh v. Keith, 6 Jur. (N. S.) 1182. See, also, Potter v. Beal (C. C. A.), 50 Fed. Rep. 860. In such cases, however, the party objecting must distinctly swear

that he believes the document to be privileged. 2 Daniell's Ch. Pr. (5th ed.) 1836; Balguy v. Broadhurst, 1 Sim. (N. S.) 111. "In courts of equity a bill or a cross-bill alleging that the defendant has in his possession or power documents or papers relating to the matters of the bill, which, if produced, will establish their truth, is the foundation of the proceeding. The defendant is required by the bill to admit or deny the truth of these allegations. If he admits having possession or power over any of the documents or papers he is required by the bill and is *prima facie* bound to describe them either in the body of his answer or in a schedule to it. The plaintiff then moves the court that the defendant may be ordered to produce and leave in the hands of the proper officer the documents and papers with liberty to the plaintiff to take copies thereof. Upon this application the defendant may controvert the materiality of the evidence sought for, and he can in any event be required to produce only such documents and papers as are referred to in the answer to the bill. This is the ordinary and the only practice to compel the production of documents except under special circumstances, as where deeds or other papers contested as false or forged are ordered to be brought into court for inspection." Per Wallace, J., in Bischoffsheim v. Brown, 29 Fed. Rep. 341, 342. A provision for an examination of the defendants in regard to the subject of in-



§ 524. **Production of documents by the plaintiff.**— A defendant cannot obtain an order for the production of documents by the plaintiff in order to enable him to answer the bill,<sup>1</sup> although he makes oath that an inspection is necessary for that purpose.<sup>2</sup> If the defendant desires a production and inspection of such documents, he must file a cross-bill against the plaintiff for a discovery of them, in which case all the rules stated in the preceding sections apply in his favor as complainant in the cross-bill.<sup>3</sup> But ordinarily no answer to the cross-bill can be obtained until the original bill has been fully answered, and the defendant has complied with any order against him for production of documents made in the original suit.<sup>4</sup>

§ 525. **Subpoena duces tecum against persons not parties.** If documents the production of which is desired are in the possession of one not a party to the suit, he may be compelled by a subpoena *duces tecum* to produce them, and if the subpoena is not obeyed he will be punished for contempt on proof by affidavit that the documents are in his custody.<sup>5</sup>

quiry and for the production by them of their account books and papers is proper and usual in an interlocutory decree in a suit in equity for the infringement of a copyright. *Callaghan v. Myers*, 128 U. S. 618.

<sup>1</sup> 2 Daniell's Ch. Pr. (2d ed.) 1819.

<sup>2</sup> *Penfold v. Nunn*, 5 Sim. 409.

<sup>3</sup> 8 Greenleaf on Evidence (15th ed.), § 802; *Kelly v. Eckford*, 5 Paige, 548; *Bogert v. Bogert*, 2 Edw. Ch. 899; *White v. Buloid*, 2 Paige, 164; *Talmage v. Pell*, 9 Paige, 410; 2 Daniell's Ch. Pr. (5th ed.) 1819; *Lupton v. Johnson*, 2 Johns. Ch. 429. There are a few exceptions to the rule; as, for instance, where both parties are equally entitled to possession. *Potter v. Potter*, 8 Ark. 719; *Pickering v. Rigby*, 18 Ves. 484; 8 Greenleaf on Evidence (15th ed.), § 803.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1819; 8 Greenleaf on Evidence (15th ed.),

§ 802. See, also, United States Equity Rule 72.

<sup>5</sup> 8 Greenleaf on Evidence, § 805; *Johnson Steel Street-Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 191, 192; *United States v. Babcock*, 8 Dill. 566; *Bull v. Loveland*, 10 Pick. 9; *Amey v. Long*, 9 East, 478; *Corsen v. Dubois*, 1 Holt N. P. 289. United States Equity Rule 78, authorizing clerks to issue subpoenas in blank, applies to subpoenas *duces tecum*. United States Revised Statutes, section 869, providing for an order of court for such a subpoena, applies to depositions *de bene esse* under United States Revised Statutes, section 868; or in *perpetuam rei memoriam* and under a *dedimus potestatem* under United States Revised Statutes, section 866, and not to testimony taken under the general powers of a court of equity in the



§ 526. The same subject continued.— A person not a party to the suit may be compelled to produce certain drawings by subpoena *duces tecum* although the papers relate to a valuable secret method of producing a manufactured article.<sup>1</sup> A subpoena *duces tecum* can only be used to compel the production of written instruments, papers, books or documents.<sup>2</sup> Patterns for stove castings are not the subject of such a writ;<sup>3</sup> nor a piece of metal in the nature of a form or model.<sup>4</sup>

§ 527. Subpoena *duces tecum* against parties.— On general considerations of expediency and policy it is difficult to

mode prescribed by the equity rules. Johnson Steel-Rail Co. v. North Branch Steel Co., 48 Fed. Rep. 191, 192; *Ex parte* Fisk, 118 U. S. 718; s. c., 5 S. Ct. Rep. 724. Where a witness, intending no disobedience of a subpoena *duces tecum*, refuses to produce the documents required, in order to contest upon attachment proceedings the right to compel a disclosure, a rule for an attachment for contempt will be discharged as a matter of course upon his producing the documents in accordance with the opinion of the court, and paying the costs of the application. Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. Rep. 191, 194. The court will not grant a motion to compel the opening of the records of a corporation not a party to the suit, but whose records it is claimed would disclose something of importance to the litigation. Henry v. Travelers' Ins. Co., 85 Fed. Rep. 15. A subpoena *duces tecum* commanding a party to appear at a certain place and time named in the writ, and bring with him a certain book, but omitting the direction to testify, is invalid, and the party refusing to obey it cannot be attached for contempt. Murray v. Elston, 28 N. J. Eq. 212. A witness who is required by a subpoena *duces tecum* to attend before an examiner and produce a paper in

his possession as evidence in a cause is not bound to produce such paper until he has been sworn as a witness; to enable him to state upon oath the reasons, if there are any, why he should not be compelled to produce the paper in evidence. Aikin v. Martin, 11 Paige, 499.

<sup>1</sup> Johnson Steel-Rail Co. v. North Branch Steel Co., 48 Fed. Rep. 191. See, also, Wertheim v. Railway &c. Co., 15 Fed. Rep. 716; *Ex parte* Judson, 8 Blatchf. 89.

<sup>2</sup> Case of Shephard, 3 Fed. Rep. 12. In 1 Wharton on Evidence, § 614, a document is defined as follows:— "An instrument upon which is recorded, by means of letters, figures or marks, matter which may be evidentially used. In this sense the term applies to writings; to words printed, lithographed or photographed; to seals, plates or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility it makes no difference what is the thing on which the words or signs offered may be recorded. They may be on stones or gems or on wood, as well as on paper or parchment."

<sup>3</sup> Case of Shephard, 3 Fed. Rep. 12.

<sup>4</sup> Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. Rep. 191.

perceive why documents and books whose production would elucidate the issues involved in the suit should be more guarded or inaccessible in the hands of parties than in the custody of others, and accordingly the general rule seems to be settled that a party to the suit,<sup>1</sup> or the officer of a corporation party,<sup>2</sup> may be compelled by a subpoena *duces tecum* to produce books and documents of the corporation material to the issue.

§ 528. **Inspection of documents on subpoena duces tecum.** Where a party brings documentary evidence into court in obedience to a subpoena *duces tecum*, he has a right to object to its inspection by his adversary or its introduction in evidence before it has been exhibited to any one but the court.<sup>3</sup> Certain documents which were specifically called for by a subpoena *duces tecum*, and particularly described therein, were placed by the complainant in the examiner's hands, and the defendant thereupon demanded permission to examine the documents, to be used as evidence by him if he should be so advised. The complainant objected to the inspection upon various grounds, which objection was certified to the court, who examined the document, and, upon finding it sufficiently germane to the issues and in other respects competent evidence, granted leave to the defendant to inspect the document before offering it in evidence.<sup>4</sup> After a party has inspected a document produced by his adversary in response to a subpoena *duces tecum* issued by him, such document may be admitted as evidence for his adversary if he himself declines to put it in.<sup>5</sup>

<sup>1</sup> *Bischoffsheim v. Brown*, 29 Fed. Rep. 843; *Murray v. Elston*, 28 N. J. Eq. 312; *Merchants' Nat. Bank v. State Nat. Bank*, 8 Cliff. 201. A party cannot excuse non-compliance with a subpoena *duces tecum* commanding him to produce documents, unprivileged in his own hands, by showing that he has delivered them into the hands of his counsel. *Edison Electric L. Co. v. United States Electric L. Co.*, 44 Fed. Rep. 294.

<sup>2</sup> *Johnson Steel-Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 195;

*Edison Electric L. Co. v. United States Electric L. Co.*, 44 Fed. Rep. 294; s. c., 45 Fed. Rep. 55; *Wertheim v. Railway & Co.*, 15 Fed. Rep. 716.

<sup>3</sup> See *Potter v. Beal* (C. C. A.), 50 Fed. Rep. 860.

<sup>4</sup> *Edison Electric L. Co. v. United States Electric L. Co.*, 45 Fed. Rep. 55.

<sup>5</sup> *Edison Electric L. Co. v. United States Electric L. Co.*, 45 Fed. Rep. 55, 59; *Jordan v. Wilkins*, 2 Wash. C. C. 482; *Wallar v. Stewart*, 4 Cranch, C. C. 582.

**§ 529. Inspection before trial.**— Under the former practice in England a party could not, in the absence of special circumstances, compel his adversary to produce, before the hearing, an exhibit, however it had been proved,<sup>1</sup> except, perhaps, if it were set out in a deposition *in hæc verba*,<sup>2</sup> or where it was necessary for cross-examination.<sup>3</sup> Information and use of the contents of books and documents in a party's possession could only be obtained by bill of discovery, requiring the respondent to set out the contents at large in the answer.<sup>4</sup> It was held in the United States circuit court for the southern district of New York that the complainant could not be required, by motion, to produce books and documents for the inspection of the defendant in order to enable the latter to prepare for trial;<sup>5</sup> but a similar motion was granted in the circuit court for the eastern district of Pennsylvania.<sup>6</sup>

**§ 530. Inspection in aid of proof.**— Although courts of chancery determine every matter by written or printed evidence, nevertheless when the subject-matter of the evidence can be readily produced in court, and is of a character to

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 885; *Forrester v. Helme*, McCl. 458; *Lord v. Colvin*, 2 Drew. 205; s. c., 5 De G., M. & G. 47, where the court denied a motion by the complainant so far as it sought the production of certain documents which had been handed on behalf of the defendant to a witness examined on the part of the defendant before an examiner for the mere purpose of verifying the handwriting; *Hodson v. Warrington*, 3 P. Wms. 35; *Davers v. Davers*, 2 P. Wms. 410; *Fencott v. Clark*, 6 Sim. 8; *Wiley v. Pistor*, 7 Ves. 411.

<sup>2</sup> *Hodson v. Warrington*, 3 P. Wms. 35.

<sup>3</sup> *Bell v. Johnson*, 1 J. & H. 682. See, also, *Lord v. Colvin*, 5 De G., M. & G. 47, 50.

<sup>4</sup> *Coit v. North Carolina G. A. Co.*, 9 Fed. Rep. 577. See § 840, *supra*.

<sup>5</sup> *Guyot v. Hilton* (1887), 82 Fed. Rep. 748, per Lacombe, J. See, also,

*Colgate v. Compagnie Francaise &c.*, 23 Fed. Rep. 82, 83; *Paine v. Warren*, 33 Fed. Rep. 857; *Edison Electric L. Co. v. United States Electric L. Co.*, 44 Fed. Rep. 294, 300, where it was held that such an order would not be made when a subpoena *duces tecum* would be ample to produce the evidence. As to the right to inspect a document brought into court by a subpoena *duces tecum*, see *Edison Electric L. Co. v. United States Electric L. Co.*, 45 Fed. Rep. 55.

<sup>6</sup> *Coit v. North Carolina G. A. Co.* (1881), 9 Fed. Rep. 577, where Butler, D. J., in an oral opinion, adopted as a proper practice in equity the provisions of United States Revised Statutes, section 724, relating to the production of books, etc., in the trial of actions at law. The motion should be supported by an affidavit of materiality which may be met by counter-affidavit.

elucidate the evidence, the chancellor will order the production of such subjects before him for his better satisfaction as to the truth. Thus he will order an infant to be produced in court for satisfactory proof of its existence, age and discretion; or an original document or book to be produced, in order to ascertain its genuineness and integrity, or its age, or meaning, or precise state and character; or will require models, machines and patented articles to be brought into court, especially when a comparison becomes important; and where the subject is immovable, or where the inspection of the inside of a house, or of a room, or of a lot or tract of land, is necessary to enable the party out of possession to make proper proof, the court will order the party in possession to permit an inspection by witnesses.<sup>1</sup>

**§ 531. Interlocutory order involving inspection.**—A bill was filed alleging that certain documents contained in a trunk in the possession of defendant were the private property of the complainant and personal in their nature, and praying that the defendant be enjoined from permitting the papers to be inspected, and, pending the prosecution of the suit, “from showing them, or any of them, or allowing them, or any of them, to be inspected.” The defendant and an intervenor set up adverse claims to the documents, and the court after a hearing ordered a master to examine the contents of the trunk, and without proof and without hearing the parties, except an explanation by them, to deliver to the complainant such as were not the property of the defendant, and were “necessary and material to be introduced by [the complainant] in his own behalf;” the remainder to be distributed to the defendant and the clerk of the court, according as the nature of the same should be determined by the master. It was held by the United States circuit court of appeals that this proceeding was a clear violation of the constitutional and fundamental rights of litigants as to the method of trial.<sup>2</sup>

<sup>1</sup> Gibson's Suits in Chancery, § 450, (C. C. App.), reversing s. c., 49 Fed. citing 8 Greenleaf on Evidence, Rep. 793. “We do not hold,” said Putnam, C. J., “that it is not, in proper cases, within the power of the chan-

<sup>2</sup> Daniell's Ch. Pr. (5th ed.) 1663.

<sup>2</sup> Potter v. Beal, 50 Fed. Rep. 890 cellor to substitute in lieu of himself

§ 532. **Stipulations relating to evidence.**—Stipulations between the parties by way of admissions dispensing with proof are encouraged. In general, they ought to be in writ-

a suitable master or referee for the purpose of ascertaining *prima facie* whether or not testimony offered is entitled to be heard; but we do hold that, on the state of this record, without some proof beyond what is here disclosed, the court should not inspect nor permit an inspection of the contents of the trunk, either private or public, and thus perhaps defeat the very purpose of the bill. . . . An inspection, however, if ever ordered, should be only in cases of real necessity, when the other proofs make it clear that private rights cannot be determined without it; nor should it be made without positive evidence that there are papers of doubtful ownership, nor without some evidence of their identity and character. No inspection should be permitted in suits of this character, merely because the defendant is unable to prove his case without it, nor because of mere doubts, suspicions or suggestions; nor, as we repeat, except there is a clear emergency demanding it. It is true that in a limited sense the party who seeks the aid of equity to obtain possession of private papers submits himself to the court; and yet it is to be remembered that the main object of going into equity may be, not to obtain the papers themselves, but to secure the privacy to which the owner of them is entitled, and which he may not be able to protect except with the aid of the chancellor; and it is not permissible that the chancellor should defeat at the outset—unless under extreme circumstances—any portion of the relief which the complainant seeks, and which, perhaps, may be more effectually denied by permit-

ting the privacy of his papers to be violated than by any refusal to give possession of them. . . . It is said that interlocutory production and inspection will not be ordered on the motion of a plaintiff in equity, if in this way he would practically obtain the object of his bill. This was so ruled by Sir John Leach in *Lingen v. Simpson*, 6 Madd. 290 (explained in *Chichester v. Marquis of Donegal*, 4 Ch. App. 416–419). . . . To permit an inspection, as ordered by the circuit court, would perhaps defeat the purpose of the bill as effectually as the production asked and refused in *Lingen v. Simpson*, *supra*." In *Boyd v. United States*, 116 U. S. 616; s. c., 6 S. Ct. Rep. 524, it was held that an order of court upon compulsory proceedings, compelling a party to produce a paper, the character of which was known, in order that it might be used against him, was an unconstitutional and erroneous order. In a suit for infringement of a patent a complainant will not be granted an inspection of machinery of the defendant kept in secret and claimed to embody important secrets when the complainant introduces no evidence to show that it infringes his patent. *Dobson v. Graham*, 49 Fed. Rep. 17. Upon a bill by a stockholder against a corporation and its officers praying for an examination of its books and for an account, it seems that the court may in its discretion order the corporate authorities to permit an inspection of the books at any stage of the suit; but it will not make such an order upon the filing of the bill, or before the parties have appeared and pleaded, except upon the most pressing neces-

ing and signed by the parties or their solicitors.<sup>1</sup> Such stipulations will not be sanctioned where they seek to evade established principles of law; as, for instance, an agreement permitting a wife to be a witness for or against her husband.<sup>2</sup> Parties stipulated that "in order to save the delay and expense of a commission to England, . . . on final hearing it shall be taken as though the following testimony had been given," setting out certain facts and circumstances. Subsequently it became necessary to send a commission to England to take testimony. The court declined to reject the stipulated evidence where there was no motion to have it expunged and the objection to it was first made at the hearing.<sup>3</sup> Where a party took depositions out of the time specified in a rule, under an agreement between the parties that the opposing party might introduce oral evidence at the trial, it was held that the court did not err in admitting such oral testimony.<sup>4</sup> An agreement that certain facts stated in the report of a prior case may be read in evidence is an agreement that those facts may be considered as legal evidence in the pending case.<sup>5</sup> A stipulation that a deposition taken in another cause may be read with the same force and effect as if taken upon proper notice is not a waiver of any other objection, and does not entitle the party to read the deposition if the presence of the witness at the trial would otherwise exclude it.<sup>6</sup> A stipulation that a deposition in another cause may be used does not imply that incompetent evidence therein is to be received if seasonably objected to.<sup>7</sup> Where a court admits evidence against an objection based upon a stipulation, its ruling

sity, for the pleadings might raise issues as to the right of the complainant which could not be tried on an *ex parte* application. *Ranger v. Champion Cotton Press Co.*, 51 Fed. Rep. 61, stating the general rule that where an order would be equivalent to a decree for the plaintiff or compel the defendant to disclose his defense prematurely, the court will refuse it.

<sup>1</sup> See § 586, *infra*; *Young v. Wright*, 1 Camp. (N. P.) 189; *Gainsford v. Gammer*, 2 Camp. (N. P.) 9; *Laing*

*v. Raine*, 2 Bos. & P. 85. See *Marshall v. Cliff*, 4 Camp. (N. P.) 183.

<sup>2</sup> *Barker v. Dixie*, Rep. t. Hardw. 252; *Owen v. Thomas*, 8 M. & K. 353, 357.

<sup>3</sup> *Dickerson v. Matheson*, 50 Fed. Rep. 73.

<sup>4</sup> *Baker v. Jamison*, 73 Iowa, 698.

<sup>5</sup> *Thompson v. Thompson* (Ala.), 8 So. Rep. 419.

<sup>6</sup> *Schmitz v. St. Louis Ry. Co.*, 46 Md. App. 380.

<sup>7</sup> *Appeal of Bridgham*, 82 Me. 323.



will not be disturbed on appeal if the stipulation is fairly susceptible of the construction which the court must have given it in order to admit the testimony.<sup>1</sup> Where it is stipulated that the parties shall close their testimony by a certain time, depositions taken before, but not those taken after, that time are admissible on a subsequent hearing.<sup>2</sup>

**§ 533. The same subject continued.**—Under the United States rule in equity providing for the taking of testimony by an examiner,<sup>3</sup> it has been the practice for counsel to agree that the depositions may be taken down by a typewriter in their presence, at the office of one of them, in the absence of the examiner but under his constructive direction. If one of the counsel refuses to continue the examination and demands the production of the witness before the examiner, without adequate cause shown to the court, on a subsequent motion to compel the production of the witness the testimony of the witness will be closed.<sup>4</sup>

**§ 534. Bills of discovery.**—Every bill for relief may seek a discovery from the defendant as to the matters charged therein; but a bill of discovery, strictly so called, is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds, or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, although it may pray for the stay of proceedings at law till the discovery is made.<sup>5</sup> It is commonly used in aid of the

<sup>1</sup> *Foster v. Dickerson* (Vt.), 24 Atl. Rep. 258, 261.

<sup>2</sup> *In re Thomas*, 85 Fed. Rep. 887.

<sup>3</sup> Equity Rule 67.

<sup>4</sup> *Ballard v. McCluskey*, 52 Fed. Rep. 677. After a cause was at issue, on motion of the complainant leave was given to take testimony before any examiner of the court. The first examiner notified to take testimony being sick, complainant took testimony before a second, and finally before a third, examiner. The defendants were present and cross-examined the witnesses. The court, on motion of complainant, ordered

the testimony as taken to stand, and that the third examiner should continue taking the testimony under the original order. It was held that the order of the court violated none of the equity rules, nor any of the general principles of equity. *Canton v. McGraw*, 67 Md. 588; s. c., 11 Atl. Rep. 287.

<sup>5</sup> *Story's Equity Pleading* (10th ed.), § 811. Where a bill is for relief as well as discovery, it is not necessary to allege that the facts a discovery of which is sought are within the exclusive knowledge of the defendant. *Metler v. Metler's Adm'rs*, 19



jurisdiction of some court of law to enable the party who prosecutes or defends an action at law to obtain a discovery of the facts which are material to the prosecution or defense thereof.<sup>1</sup> It will lie in aid of a prosecution or defense in a foreign court.<sup>2</sup> The filing of a bill of discovery in aid of a suit at law is justifiable where the costs of such bill will probably be less than the expense of executing a commission in a foreign country to prove the facts of which a discovery is sought.<sup>3</sup> A bill waiving an answer under oath cannot be maintained as a bill of discovery.<sup>4</sup> A discovery will not be allowed merely to guard against anticipated perjury in a suit at law.<sup>5</sup> After a verdict at law a party comes too late with a bill of discovery.<sup>6</sup> Upon the question whether a pure bill of discovery will be entertained in the federal courts, or in other jurisdictions where the statutes provide for compulsory examination of adverse parties in actions at law, the authorities are conflicting.<sup>7</sup> The bill must be filed in aid of some proceeding pending or intended, and if such purpose be not stated in the bill a demurrer will lie.<sup>8</sup>

N. J. Eq. 457, 461. If a bill contains no prayer in the usual form, either for specific or general relief, it may be considered as a bill of discovery merely, although the word decree is erroneously inserted in the prayer for process of subpoena after the word direction; which latter word instead of the former should be inserted in the prayer of process upon a bill of discovery. *McIntyre v. Trustees &c.*, 6 Paige, 239; *Schroepel v. Redfield*, 5 Paige, 245. See, also, *Rose v. Gannel*, 3 Atk. 489; *Ambury v. Jones*, Younge, 199; *James v. Herriott*, 6 Sim. 428; *Baker v. Bramah*, 7 Sim. 17; *South Eastern Ry. Co. v. Submarine Tel. Co.*, 18 Beav. 429.

<sup>1</sup>Story's Equity Pleading (10th ed.), 311. The husband being rightly joined, it is no objection to a bill for discovery of matters in which the wife only is interested that the defendants are husband and wife.

*Metler v. Metler's Adm'rs*, 19 N. J. Eq. 457.

<sup>2</sup>*Mitchell v. Smith*, 1 Paige, 287. *Contra*, *Bent v. Young*, 9 Sim. 180. But not against a defendant not a party to the suit at law, although substantially interested therein. *Burgess v. Smith*, 2 Barb. Ch. 276. Nor by a defendant against a co-defendant in the action at law. *Dykers v. Wilder*, 3 Edw. Ch. 496. But see *Savage v. Todd*, 9 Paige, 578.

<sup>3</sup>*Vance v. Andrews*, 2 Barb. Ch. 370.

<sup>4</sup>*Ward v. Peck*, 114 Mass. 121.

<sup>5</sup>*Leggett v. Postley*, 2 Paige, 599.

<sup>6</sup>*Duncan v. Lyon*, 3 Johns. Ch. 351; *Brown v. Swann*, 10 Pet. 498; *Paterson v. Bangs*, 9 Paige, 627; *Green v. Massie*, 21 Gratt. 356; *Thurmond v. Durham*, 3 Yerg. 99.

<sup>7</sup>See §§ 130, 131, *supra*.

<sup>8</sup>*United N. J. R. &c. Co. v. Hopcock*, 28 N. J. Eq. 261, 265; *Mayor &c. v. Levy*, 3 Vea. 398; *Walker v.*

§ 535. The same subject continued.—In a bill for discovery merely, it will be sufficient for the court to see that the discovery is material to the defense at law of the party seeking the discovery, and how and in what manner it is material.<sup>1</sup> A bill for discovery only is not brought to a hearing, and cannot therefore be dismissed for want of prosecution.<sup>2</sup> Upon filing a sufficient answer, the defendant is entitled to an order on motion, of course, for taxation and payment of his costs.<sup>3</sup> But if the defendant's first answer is insufficient, the costs of the exceptions to it may be ordered, on the *ex parte* application of the plaintiff, to be deducted from the costs payable to the defendant.<sup>4</sup>

Devereaux, 4 Paige, 229, 246. Wherever under existing statutes the defendant has a right to call upon the defendant as a witness, the court will require the defendant to answer interrogatories in proper form and within proper limits; evidence thus put in the pleadings being more advantageous to the complainant than it would be in the shape of a deposition. Slater v. Barnwell, 50 Fed. Rep. 150.

<sup>1</sup> Turner v. Dickerson, 9 N. J. Eq. 140; Vance v. Andrews, 2 Barb. Ch. 370. As to allegations of materiality see Atlantic Ins. Co. v. Lunar, 1 Sandf. Ch. 91; Williams v. Harden, 1 Barb. Ch. 298; Deas v. Harvie, 2 Barb. Ch. 448; Turner v. Dickerson, 9 N. J. Eq. 140; March v. Davison, 9 Paige, 580; Lane v. Stebbins, 9 Paige, 622; Norwich &c. R. Co. v. Storey, 17 Conn. 384; Leggett v. Postley, 2 Paige, 599; Brown v. Swann, 10 Pet. 497; Seymour v. Seymour, 4 Johns. Ch. 409. The weight of authority is that in bills for discovery it is not necessary to allege that the facts a discovery of which is sought are within the exclusive knowledge of the defendant. Metler v. Metler's Adm'rs, 19 N. J. Eq. 457. It is a general rule that no person can be com-

pelled to make a discovery that may subject him to a prosecution for felony, or to a penalty, or anything in the nature of a penalty, or tend to show him guilty of any moral turpitude, or to answer what is matter of scandal, or what may lead to a legal accusation. March v. Davison, 9 Paige, 580; Northrop v. Hatch, 6 Conn. 361; Skinner v. Judson, 8 Conn. 528; United States v. Salina Bank, 1 Pet. 100. But if the forfeiture or penalty is waived by those who are entitled to it, or is barred by the statute of limitations, it no longer shields the party from a discovery. Skinner v. Judson, 8 Conn. 528. See § 95, *supra*. If the defendant is protected in law from answering an interrogatory by any state of facts, he must fully state such facts in his answer as a reason for declining; a mere statement in argument by his counsel is not sufficient. Slater v. Barnwell, 50 Fed. Rep. 150.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1558; Woodcock v. King, 1 Atk. 286.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1558; Attorney-General v. Burch, 4 Mad. 178; Fitzgerald v. Bult, 9 Hare App. 65.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1559; Hughes v. Clerk, 6 Hare, 195. See Thomas v. Rawling, 27 Beav. 375.

§ 536. **Commissions to take testimony.**—It was held by the New York court of chancery that it possessed the power, independently of statutory authority, to issue a commission for the examination of witnesses either in or out of the State.<sup>1</sup> The same doctrine was affirmed by the New Jersey court of chancery.<sup>2</sup> The United States Revised Statutes provide that “in any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage.”<sup>3</sup> The words “in any case” include criminal prosecutions, actions at law and suits in equity.<sup>4</sup> The case must be one pending in the court granting the commission of which the court has jurisdiction, not one pending before some other tribunal or officer over whom the court has no control.<sup>5</sup> The words “common usage,” as applied to suits in equity, refer to the ordinary practice of courts of chancery.<sup>6</sup>

<sup>1</sup> *Brown v. Southworth*, 9 Paige, 851.

<sup>2</sup> *Una v. Dodd*, 88 N. J. Eq. 460, holding that in proceedings for contempt the court may order the evidence of witnesses resident in foreign jurisdictions to be so taken.

<sup>3</sup> United States Revised Statutes, section 866, which further authorizes the taking of depositions in *perpetuam rei memoriam*, and provides that United States Revised Statutes, sections 863, 864, 865, relating to depositions *de bene esse*, shall not apply. See *Jones v. Oregon Cent. R. Co.*, 8 Sawy. 528.

<sup>4</sup> *United States v. Wilder*, 14 Fed. Rep. 898; *United States v. Cameron*, 15 Fed. Rep. 794; *Peters v. Prevost*, 1 Paine, 64; *Bischoffsheim v. Baltzer*, 10 Fed. Rep. 1.

<sup>5</sup> *United States v. Hom Hing*, 48 Fed. Rep. 635.

<sup>6</sup> *United States v. Parrott*, 1 McAll. 447. See, also, 1 Foster's Federal Practice (2d ed.), § 288 *et seq.* Statutes providing for the taking of testimony by commission are strictly con-

strued. *Lawrence v. Finch*, 17 N. J. Eq. 285, 241. See, also, *Dwinelle v. Howland*, 1 Abb. Pr. 1; *Randall v. Venable*, 17 Fed. Rep. 162; *Armstrong v. Brown*, 1 Wash. 48; *Bondereau v. Montgomery*, 4 Wash. 186; *Guppy v. Brown*, 4 Dall. 410; *Bell v. Morrison*, 1 Pet. 355. In New Jersey it is no objection to the evidence of a non-resident witness, taken by virtue of a commission, that the witness is dead. *Lawrence v. Finch*, 17 N. J. Eq. 285. An order for oral cross-examination of a witness when taking his deposition by commission is, in effect, to turn the proceedings into *viva voce* examination; and if the power to make the order is discretionary with the court, it will only be exercised in a clear case of necessity. *Coates v. Merrick Thread Co.*, 41 Fed. Rep. 78. Where the oath taken by the commissioner was materially different from that prescribed by statute, the evidence was overruled. *Lawrence v. Finch*, 17 N. J. Eq. 285.

**§ 537. Depositions *de bene esse* under acts of congress.—** In taking depositions *de bene esse* under authority of the acts of congress,<sup>1</sup> every formality must be strictly observed.<sup>2</sup> The provision that "the testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*" applies to equity as well as common-law cases.<sup>3</sup> Testimony which was regularly in order in rebuttal may be taken by deposition in that stage of the case.<sup>4</sup> Where there is an irregularity in a deposition without fault of the party in whose interest it is taken, he should be allowed an opportunity to re-examine the witness.<sup>5</sup> A deposition *de bene esse* taken upon interrogatories propounded by both parties is not under the control of one of the parties. When taken it should be promptly forwarded by the commissioner to the court in which the cause is pending for trial.<sup>6</sup>

**§ 538. Objections to evidence.—** The party offering evidence is entitled to have the particular portion objected to pointed out, and the specific ground of objection stated, in order that he may obviate the same if possible.<sup>7</sup> When par-

<sup>1</sup> U. S. R. S., §§ 863, 864, 865. See, also, Equity Rule 68.

<sup>2</sup> *In re Thomas*, 85 Fed. Rep. 337, 340.

<sup>3</sup> *Stegner v. Blake*, 36 Fed. Rep. 183. A motion in the Supreme Court to take depositions *de bene esse*, pending an appeal, to be used in the circuit court, was denied, there being a remedy under section 866 of the Revised Statutes, which gives the circuit court authority in the matter. *Richter v. Jerome*, 115 U. S. 55.

<sup>4</sup> *Stegner v. Blake*, 36 Fed. Rep. 183.

<sup>5</sup> *In re Thomas*, 85 Fed. Rep. 822.

<sup>6</sup> *First Nat. Bank v. Forest*, 44 Fed. Rep. 246. Where the complainant's testimony has all been taken by commission, the evidence may be published, upon the defendant's motion, before the latter opens his case, with proper precautions that he does not deprive the complainant of any advantage he may enjoy by reason of

laches of the defendant. *Eillert v. Craps*, 44 Fed. Rep. 792. Where a party attends and cross-examines a witness whose deposition is being taken, all irregularities in the taking of it or occurring during the examination of the witness, not objected to at the time, are deemed to be waived. *In re Thomas*, 85 Fed. Rep. 822.

<sup>7</sup> *Hamilton v. Southern Nev. Min. Co.*, 33 Fed. Rep. 562; *Satterlee v. Bliss*, 36 Cal. 489, 511; *Cochran v. O'Keefe*, 34 Cal. 554, 558. Failure to object is an implied waiver. *Perry County v. S. & M. R. Co.*, 65 Ala. 391; *Brewer v. Browne*, 68 Ala. 210; *Masterson v. Pullen*, 62 Ala. 145. An objection on the ground of "irrelevancy" or "incompetency" is too indefinite. *Hamilton v. Southern Nev. Min. Co.*, 33 Fed. Rep. 562; *Owen v. Frink*, 24 Cal. 177; *Fisher v. Neil*, 6 Fed. Rep. 90. See, also, *Wood*

particular grounds of objection are specified, such specification is exclusive, and all grounds not pointed out are deemed to be waived.<sup>1</sup>

§ 539. **The same subject continued.**—The United States Supreme Court declared the rule with respect to the necessity of incorporating into the record testimony in equity cases before an examiner which is objected to and ruled out, as follows:—“If testimony is objected to and ruled out it must be sent here with the record subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might on examination be of opinion that the objection to it ought not to have been sustained. Ample provision having been made by the rules for the taking of testimony and saving exceptions, parties, if they prefer to adopt some other mode of presenting their case, must be careful to see that it conforms in other respects to the established practice of the court.”<sup>2</sup>

*v. Weimar*, 104 U. S. 795; *Camden v. Doremus*, 8 How. 529; *Burton v. Driggs*, 20 Wall. 133; *Seals v. Robinson*, 75 Ala. 363, 369. The validity or legal effect of a deed is not questioned by objecting to a transcript of the registry on the ground that it is “insufficient and illegal.” *March v. England*, 65 Ala. 275. Motions to suppress, founded on exceptions regularly filed, are properly heard before entering upon the trial. *Beattie v. Abercrombie*, 18 Ala. 9; *Wood v. Chetwood*, 27 N. J. Eq. 311. By consent, however, they may be and frequently are heard and determined in connection with the main cause. *Binford v. Dement*, 72 Ala. 491, 492, where the court disapproved the practice of stipulating that the chancellor may disallow upon the trial all illegal evidence, as casting upon him unnecessary labor. As a general rule, evidence which is merely incompetent or irrelevant will not be suppressed prior to final hearing; but evidence

which is scandalous, or has been taken irregularly or imperfectly, or in violation of the privileges of either of the parties, may be. *Williams v. Vreeland's Ex'rs*, 30 N. J. Eq. 576, and numerous cases there cited.

<sup>1</sup>*Hamilton v. Southern Nev. & Min. Co.*, 33 Fed. Rep. 562; *Evanston v. Gunn*, 99 U. S. 665; *Belk v. Meagher*, 104 U. S. 279; *Fischer v. Neil*, 6 Fed. Rep. 90. Where a written contract was admitted over an objection that it was incompetent and immaterial, the objection on appeal that its execution was not proved was disregarded. *Falk v. Gast L. & E. Co.*, 54 Fed. Rep. 890.

<sup>2</sup>*Blease v. Garlington*, 92 U. S. 8. See, also, *Lloyd v. Pennie*, 50 Fed. Rep. 4, holding that letters, even if privileged as between husband and wife, when offered as primary evidence of a fact before the examiner, and objected to, should nevertheless be produced, whether admitted in evidence or not, so as to be made

§ 540. **Objections to competency of witnesses.**—Objections to the competency of a witness should be taken at the earliest opportunity,<sup>1</sup> unless the incompetency is unknown or disclosed only by the answers of the witness,<sup>2</sup> or is of such a nature as to be incurable,<sup>3</sup> in which case an objection will be entertained although not taken until the hearing.<sup>4</sup>

§ 541. **Compelling a witness to answer.**—On an examination before a special examiner a witness will be compelled by proceedings in contempt to answer questions that seem to be material to the issue.<sup>5</sup> Upon an application for an attachment in such cases “the court generally inclines towards the application and requires an answer wherever it seems probable that the testimony may be relevant. Care, however, must be

part of the record. Where the record showed a clear title to relief in the complainant, but also that evidence was offered which, if admitted, might possibly have proved the contrary, and was rejected in such a way that the record did not disclose the nature of the proposed proof, the appellate court was unable to enter a decree dismissing the bill. *Potter v. Beal*, 50 Fed. Rep. 860, 864.

<sup>1</sup> *Binford v. Dement*, 72 Ala. 491; *Purcell v. McNamara*, 8 Ves. 824; *Vaughan v. Worrall*, 2 Swanst. 395, 398, 399; *Mill v. Mill*, 12 Ves. 406; *Fenton v. Hughes*, 7 Ves. 290; *United States v. Hair Pencils*, 1 Paine, 400; *Gregory v. Dodge*, 4 Paige, 557; *Minuse v. Cox*, 5 Johns. Ch. 441; *Boone v. Ridgway*, 29 N. J. Eq. 548; *Sheridan v. Medara*, 10 N. J. Eq. 469, holding that an objection to a witness on the ground of incompetency should be made before the direct examination. See, also, *Neville v. Demeritt*, 2 N. J. Eq. 321.

<sup>2</sup> *Binford v. Dement*, 72 Ala. 491; *Goss v. Stinson*, 2 Sumn. 608; *Needham v. Smith*, 2 Vern. 468; *Perigal v. Nicholson*, Wightw. 63; *Callahan v. Rochfort*, 3 Atk. 648; *Rogers v. Dibble*, 3 Paige, 238.

<sup>3</sup> *Kelsey v. Snyder*, 118 Ill. 544. See, also, *Warren v. Warren*, 105 Ill. 568; *Lockwood v. Mills*, 39 Ill. 606; *Clauser v. Stone*, 29 Ill. 114.

<sup>4</sup> The objection is then taken by motion for leave to examine as to the point of competency upon affidavit of previous ignorance of the fact. *Callahan v. Rochfort*, 3 Atk. 648. See, also, *Mohawk Bank v. Atwater*, 2 Paige, 60. As to waiver of objections, see *Norden v. Williamson*, 1 Taunt. 378; *Honeywood v. Peacock*, 3 Camp. 196; *Vaughan v. Worrall*, 2 Swanst. 400; *Moorhouse v. De Passow*, 19 Ves. 485. The deposition of a party who was a competent witness when examined may be read at the hearing though he has become incompetent. *Marlatt v. Warwick*, 19 N. J. Eq. 489; *Williams v. Vreeland*, 30 N. J. Eq. 576; *Hitchcock v. Skinner*, Hoff. Ch. 21. “To restore the English practice, so long disused in this State, of requiring all objections to the competency of witnesses to be made before the depositions are read at the hearing, would be impolitic.” *Walker v. Hill*, 23 N. J. Eq. 518, 518.

<sup>5</sup> *Johnson Steel-Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 196.



exercised to avoid any unnecessary and improper inquiry into private affairs.”<sup>1</sup>

§ 542. **Return of depositions.**—Statutes prescribing the manner in which depositions must be returned require a strict compliance with all the conditions.<sup>2</sup> Thus, the South Carolina statute provides that depositions taken by an officer shall be “by such officer sealed up . . . and directed to the court . . . and remain under his seal” until opened in court. On one side of an envelope in which a deposition was transmitted to the court by mail was written the name and address of the clerk of the court, the names of the witnesses examined and of the notary, and the title of the cause. On the other side of the envelope there was written or stamped the word “registered.” The envelope was securely sealed with mucilage or some other adhesive substance; and it did not appear in any way to have been opened or tampered with. It was held that the deposition was not admissible.<sup>3</sup>

§ 543. **Admissibility of depositions without cross-examination.**—The general rule of the common-law courts is that no evidence shall be admitted but what is or might be under

<sup>1</sup> Per Butler, J., in *Robinson v. Railroad Co.*, 28 Fed. Rep. 340; *Johnson Steel-Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 196.

<sup>2</sup> See *Bell v. Morrison*, 1 Pet. 355; *Shutte v. Thompson*, 15 Wall. 161.

<sup>3</sup> *Travers v. Jennings* (S. C.), 17 S. E. Rep. 849, where the court said the statute requires some act on the part of the notary by which he shall evince that the package sent to the court is his work. “If he had used sealing wax and had stamped his notarial seal, or had used sealing wax and had written his name across the same, or if he had written his name across the flap of the envelope after he had caused it to adhere to the body of the envelope, it seems to us that any one of these methods would have answered the demands of the

statute in this respect.” See, also, *Brown v. Southworth*, 9 Paige, 351; *In re Thomas*, 85 Fed. Rep. 337. Where the envelope containing the testimony returned by commissioners showed an abrasion at one end, which the court was satisfied occurred in the transmission in the mail-bags, a motion to suppress the commission was refused. *Eiffert v. Craps*, 44 Fed. Rep. 164. It is not necessary that the *return* should show that the officer before whom the commissioner was sworn was duly authorized to administer an oath in the State where the commission was executed. All that the court requires is competent evidence of the authority of the officer to administer the oath. *Lawrence v. Finch*, 17 N. J. Eq. 234.



the examination of both parties.<sup>1</sup> But in equity a deposition is not as of course inadmissible in evidence, even if there has been no cross-examination and no waiver of the right;<sup>2</sup> and, by a strong preponderance of authority at least, the testimony of a witness may be received where his cross-examination has been prevented by inevitable accident,<sup>3</sup> without any fault of the party producing the witness or of the witness himself,<sup>4</sup> or out off by death.<sup>5</sup>

**§ 544. Right of a party to suppress depositions.**—When the parties to an equity cause stipulate that testimony may be taken before any officer or magistrate qualified to administer oaths without special appointment by the court as an examiner, the depositions thus taken must be filed of record as required by United States Equity Rule 67 in cases where an examiner is regularly appointed; and a party in whose behalf the testimony was taken has no right to suppress it.<sup>6</sup>

<sup>1</sup> *Gass v. Stinson*, 8 Sumn. 98; *Cazenove v. Vaughan*, 1 M. & Selw. 4, 6; *Attorney-General v. Davison*, 1 McC. & Y. 160; *Anon. v. Brown*, Hardres, 815; *Watts' Case*, Hardres, 832; *Kissam v. Forrest*, 25 Wend. 651. Cf. *Rex v. Doolin*, 1 Jebb (Cr. Cas.), 123.

<sup>2</sup> "Thus, if a witness, after being examined on the direct interrogatories, should refuse to answer the cross-interrogatories, the party producing the witness will not be deprived of the benefit of his direct testimony; for upon application to the court the witness would have been compelled to answer. *Courtenay v. Hoskins*, 2 Russ. 253. But if the witness should secrete himself to avoid a cross-examination, there the court would or at least might suppress the direct examination. *Flowerday v. Collet*, 1 Dick. 288." Justice Story in *Gass v. Stinson*, 8 Sumn. 98, 106, where a deposition was admitted, no cross-interrogatories having been seasonably filed and the witness having died.

<sup>3</sup> Per Justice Story in *Gass v. Stinson*, 8 Sumn. 98, 106.

<sup>4</sup> *Scott v. McCann* (Md.), 24 Atl. Rep. 536; *Gass v. Stinson*, 8 Sumn. 98, where Justice Story discusses the question; *Courtenay v. Hoskins*, 2 Russ. 253; *O'Callaghan v. Murphy*, 2 Sch. & Lef. 158; *Arundel v. Arundel*, 1 Rep. Ch. 90; *Nolan v. Shannon*, 1 Moll. 157. See, also, *Davies v. Otty*, 35 Beav. 208; *Abadom v. Abadom*, 24 Beav. 243.

<sup>5</sup> *Celluloid Mfg. Co. v. Arlington Mfg. Co.*, 47 Fed. Rep. 4, subject, however, to objections on the ground of hearsay, etc. s. c., per Green, J. The action of an examiner in adjourning a hearing after a witness is tendered for cross-examination is final. And if the party who offered the witness refuses to produce him for cross-examination, his testimony in chief will be suppressed. *Shapleigh v. Chester & Co.*, 47 Fed. Rep. 848.

<sup>6</sup> *Mott Iron Works v. Standard Mfg. Co.*, 48 Fed. Rep. 345, where the court said:—"The rule in suits at

**§ 545. Re-examination of witnesses.**— It is a salutary rule which should be observed, not only for the orderly conduct of an equity suit but also for the purposes of justice, that the depositions of witnesses previously examined as to the same

law has long been that when a deposition was filed either party was entitled to read it under the rules which might govern as to its competency and relevancy, and that it could not be suppressed by the party at whose instance the witness was examined in chief. *Bennett v. Williams*, 57 Pa. St. 404; *Nussear v. Arnold*, 18 Serg. & R. 828. If this be so in proceedings at law where nothing is in evidence before the jury until formally offered and admitted, much more would it be the case in proceedings in equity where there is no formal offer of testimony at the hearing, where all testimony taken in the case is at once practically in evidence, to be regarded or disregarded by the court in making its decree as it shall regard it as competent and relevant or otherwise. In the case of *Bank v. Forest*, 44 Fed. Rep. 246, an action at law, the commissioner before whom a deposition *de bene esse* had been taken refused to file it, under instructions from the counsel of the party on whose behalf the witness had been examined. But the court held that the deposition was not under the control of the party at whose instance it had been taken, and that an order should be made for its filing at the instance of the other party. . . . In the Case of *Rindskopf*, 24 Fed. Rep. 542, the court said respecting a deposition *de bene esse* where the party on whose behalf the witness was examined sought to stop the cross-examination by withdrawing the proceedings for taking the deposition: — ‘The party who started the taking of it appears to have no right to its custody or to its suppression.

The authority taking it appears to represent the court *pro hac vice* for the purpose of authenticating the testimony of the witness and preserving it for the trial according to its admissibility and weight. When taken it is taken in the cause for the use of either party according to its relevancy and competency. The party making this motion was interested in the testimony that was taken and seemed to have the right to have it affected by cross-examination as it might be whether used by one party or the other.’ In *Sturgis v. Morse*, 26 Beav. 562, the master of the rolls said: — ‘I apprehend that evidence given for any defendant is evidence for the whole cause and that the plaintiff may make use of it both in argument and comment. I have known it done repeatedly, and I think that the evidence in the cause may be made use of by the plaintiff against the defendants and by the defendants against the plaintiff.’ Upon principle and authority, therefore, I think that this testimony, taken in accordance with the stipulation of the parties, should be filed in the clerk’s office. The fees of the commissioner should, however, be paid by the defendants before the testimony is filed — the question as to which party shall ultimately pay them being left for future decision; but at present the defendant desiring the use of the testimony should pay the fees. *Frese v. Biedenfeld*, 14 Blatchf. 402.” *Mott Iron Works v. Standard Mfg. Co.*, 48 Fed. Rep. 845. See, also, on the main point, *Grant v. Davis* (Ind. App.), 81 N. E. Rep. 587.

matters will be suppressed unless an order of the court for cause shown has been first obtained for the re-examination, in which the terms on which the leave is granted and the interrogatories proper to be asked are specially settled.<sup>1</sup> The passage of an order allowing a re-examination is a matter resting in the discretion of the court and not subject to review on appeal.<sup>2</sup>

§ 546. **The same subject continued.**— When, however, a witness is re-examined without an order for that purpose, and no motion is made to suppress the testimony upon that ground, and the opposing party relies upon objections made when filing cross-interrogatories which were not called to the attention of the chancellor, the case will not be reversed because of such irregularity in taking the deposition.<sup>3</sup> So where, after the examination of a witness, who had been recalled without leave of court by the party originally calling him, an agreement was made to refer the case to an auditor to state an account on the evidence in the case, the objection that the examination was improper was not sustained.<sup>4</sup>

§ 547. **Additional testimony — The general rule.**— The general rule which rests on considerations of suppressing per-

<sup>1</sup>Thurber v. Cecil Nat. Bank, 52 Fed. Rep. 518; 8 Greenleaf on Evidence, § 886; Hansom v. Trustees &c., 11 N. J. Eq. 441; Crawford v. Bartholf, 1 N. J. Eq. 458; Delany v. Noble, 3 N. J. Eq. 441; Case v. Abeel, 1 Paige, 680. The court should always require satisfactory ground to be laid for such leave, such as mistake or inadvertent omission. Girault v. Adams, 61 Md. 1, 9; Rowley v. Adams, 1 M. & K. 545. The question was fully considered by Lord Thurlow in Vaughan v. Lloyd, 1 Cox, 813, where the rule and the reasons upon which it is founded are stated with great clearness. See, also, Remsen v. Remsen, 2 Johns. Ch. 495, where Chancellor Kent reviews the authorities and states the rules which should govern in taking testimony in chan-

cery. Browning v. Louisa, 2 Dick. 508. In Trustees &c. v. Heise, 44 Md. 453, under leave to take additional testimony, a party was re-examined as to matters upon which he had been previously examined and the evidence was suppressed. A witness cannot, without leave of the court, be re-examined on a matter as to which he has been previously examined; but the ground of objection must be specifically stated when he is recalled or his testimony will not be excluded. The rule, however, does not prevent the recalling of a witness in rebuttal. Osborne v. O'Reilly, 34 N. J. Eq. 60.

<sup>2</sup>Swartz v. Chickering, 58 Md. 290.

<sup>3</sup>Bonner v. Young, 68 Ala. 35.

<sup>4</sup>Young v. Omohundro, 69 Md. 424; s. c., 16 Atl. Rep. 120.

jury and preventing the fabrication of evidence prohibits the examination of new witnesses and the taking of additional evidence after the parties have had opportunity, by publication of the testimony, to understand wherein the evidence taken fails to meet the exigencies of their case.<sup>1</sup> The rule was formulated and definitely expressed in one of the ordinances of Lord Bacon:—"No witnesses shall be examined after publication except by consent or by special order *ad informandam conscientiam judicis*, and then to be close-sealed to the court to peruse or publish as the court shall think good."<sup>2</sup> The power to permit additional testimony to be taken after publication should be sparingly exercised, the merits of the case being the controlling consideration.<sup>3</sup>

<sup>1</sup> *Dixon v. Higgins*, 82 Ala. 284; s. c., 2 So. Rep. 289, where the court said that "though in some instances there may have been too much laxity, the courts have generally observed the rule; and judicial discussions have generally arisen on the engrafted exceptions which have been deemed conducive to the ends of truth and justice." See, also, *Eilbert v. Craps*, 44 Fed. Rep. 792, 798.

<sup>2</sup> "The true exposition of the latter qualification of this rule would seem to be that the new evidence to inform the conscience of the judge should not be taken but upon or after the hearing when the judge himself entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a satisfactory decree. So was the doctrine held in *Newland v. Honeman*, 2 Ch. Cas. 74; and it is strongly fortified by what fell from Lord Manners, in *Savage v. Carroll*, 2 Ball & B. 283, 284, and by the master of the rolls in *Parker v. Whitby*, 1 Turn. & R. 366. Except for such purposes, and under some special order of the court itself at or after the hearing, no such testimony taken after publication is now deemed admissible, at least unless under extraordinary cir-

cumstances, under the rules. The practice of taking such testimony before the hearing, and keeping it sealed up, to be used by the court at the hearing if it should be deemed meet, is said by the text-writers to have fallen into disuse and not to have been in practice for more than a century." Per Story, J., in *Wood v. Mann*, 2 Sumner, 816, 819.

<sup>3</sup> *Mulock v. Mulock*, 28 N. J. Eq. 15; *Dixon v. Higgins*, 82 Ala. 284; s. c., 2 So. Rep. 289, 291. It should not be permitted, said Chancellor Kent, in *Gray v. Murray*, 4 Johns. Ch. 415, "merely to alter or correct testimony after the cause has been heard and discussed and decided upon the very matters of fact to which that testimony referred." *Harrell v. Mitchell*, 61 Ala. 270; *Gordon v. Tweedy*, 74 Ala. 233, 236. "It is not proper on the hearing to open the case generally, or to open it without special reasons at all. It is the duty of the parties to furnish their proofs before hearing, and the case must be very particular where they can be allowed to do so after they have introduced all that they regarded as necessary before the hearing." *Wendell v. Highstone*, 52 Mich. 552; *Trustees &c. v. Heise*, 44 Md.

§ 548. The same subject continued — Illustrations.— Thus, a party will not be allowed to open a case and have evidence retaken where his motion papers fail to show newly-discovered evidence, or evidence of which he could not avail himself at the first hearing, and where it appears that he merely wishes to deny what he might have denied before.<sup>1</sup> Where defendant has submitted the cause on the report of a master, bill, answer, replication, exhibits, evidence taken before the master, and exceptions, he cannot at the hearing, after his exceptions have been overruled, introduce other and further testimony.<sup>2</sup> An application to open the case after evidence closed, argument heard and report made, in order that the defendants might introduce testimony in their possession and knowledge at the time of the hearing, the importance of which they then knew, was refused.<sup>3</sup>

§ 549. The same subject continued — Exceptions to the rule.— Although the propriety of re-opening a case for the purpose of obtaining additional testimony is discountenanced as a general rule, the exercise of the power is addressed to the sound discretion of the court;<sup>4</sup> and it is not uncommon

458, 465. Notice of the motion should be given to the opposite party. *Hammersley v. Brown*, 2 Johns. Ch. 428. See, also, *Bogardus v. Trinity Church*, 4 Sandf. Ch. 369. The deposition of a witness whose examination was not closed until after publication had passed was allowed to be read, he having been cross-examined by the opposite party and no actual abuse appearing; but such practice is irregular. *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339.

<sup>1</sup> *Witters v. Sowles*, 31 Fed. Rep. 5, holding also that errors of judgment on the part of counsel or a want of attention or capacity are not grounds for opening a case to take the testimony over again. The question is there thoroughly discussed by Judge Wheeler. See, also, *Ruggles v. Eddy*, 11 Blatchf. 524; *Witters v. Sowles*, 32 Fed. Rep. 765, 766; *Web-*

*ster Loom Co. v. Higgins*, 13 Blatchf. 349; *De Florez v. Reynolds*, 16 Blatchf. 397; *India Rubber Co. v. Phelps*, 8 Blatchf. 85; *Hitchcock v. Tremaine*, 9 Blatchf. 550; *Prevost v. Gratz*, Peters' C. C. 364; *Livingston v. Hubbs*, 3 Johns. Ch. 124. Cf. *Sharp v. Wyckoff*, 89 N. J. Eq. 95.

<sup>2</sup> *Cox v. Pierce*, 22 Ill. App. 43.

<sup>3</sup> *Appeal of Shea*, 121 Pa. St. 302; s. c., 15 Atl. Rep. 629. To the same effect, *Baker v. Jamison*, 73 Iowa, 698; s. c., 38 N. W. Rep. 647; *Wendell v. Highstone*, 52 Mich. 552. A motion to take cumulative testimony, to be used on an application for a rehearing, was refused. *Eureka Co. v. Edwards*, 80 Ala. 250.

<sup>4</sup> Which was held in *Trustees &c. v. Heise*, 44 Md. 453, 465, not to be a subject of review by an appellate court. *Dixon v. Higgins*, 82 Ala. 284; s. c., 2 So. Rep. 289, 291, where it

to allow it to be done in cases where, from accident or inadvertence, omissions or defects have occurred which the party could have readily supplied, and where it is deemed necessary to a right and satisfactory decree.<sup>1</sup> Many cases upon the subject were brought together and reviewed by Vice-Chancellor Shadwell in *Hood v. Pimm*,<sup>2</sup> where it was shown that a court of equity will at any stage of the proceedings before final decree allow defects in proof to be supplied, provided the party applying has not precluded himself from such indulgence by negligence or delay.<sup>3</sup> Where the insufficiency of proof is due to the inadvertence of counsel, a cause may be ordered to stand over, after final hearing, for additional proof.<sup>4</sup> Proceedings upon a decree will be stayed for the purpose of allowing parties to take and file testimony newly discovered, when such testimony appears to be material, and its materiality was not so direct and apparent that the failure to discover and produce it on the first hearing amounted to laches.<sup>5</sup> Where there is such an insufficiency of testimony as to preclude making a just decree, and the points are covered by the pleadings, and are such that there can be

was said to be a common understanding of solicitors and chancellors that when testimony is published by consent "without prejudice" it is deemed a consent reservation of the right to take additional testimony. *Gordon v. Tweedy*, 74 Ala. 282; *Nunn v. Nunn*, 66 Ala. 35; *Wagoner v. Wagoner* (Md.), 10 Atl. Rep. 221; *Caswell v. Bunch* (Ga.), 7 S. E. Rep. 270.

<sup>1</sup> *Dixon v. Higgins*, 82 Ala. 284; s. c., 2 So. Rep. 289, 295; *Hughes v. Eades*, 1 Hare, 186; *Attorney-General v. Severne*, 1 Col. 317; *Hood v. Pimm*, 4 Sim. 101; *Mulock v. Mulock*, 28 N. J. Eq. 15, a case which received great consideration; *Harrell v. Mitchell*, 61 Ala. 270; *Johuston v. Glasscock*, 2 Ala. 218, 251; *Hewes v. Hewes*, 1 Sim. 1; *Gregory v. Marychurch*, 12 Beav. 275; s. c., 19 L. J. Ch. (N. S.) 77, a very instructive case.

<sup>2</sup> 4 Simons, 101.

<sup>3</sup> After a reference and report in an action for a partnership accounting, defendant filed a petition and affidavit to the effect that he had discovered numerous checks and receipts which, if taken into account, would show that he was improperly charged with certain sums by the master, and as to which sums he was unable to give an explanation on the hearing. The court opened the case to let in further testimony, although the defendant was guilty of laches in the non-production of such evidence, he having been the acting and controlling manager of the entire partnership business. *Dignan v. Dignan* (N. J. Ch.), 17 Atl. Rep. 546.

<sup>4</sup> *Sharp v. Wyckoff*, 39 N. J. Eq. 95. Cf. *Witter v. Sowles*, 81 Fed. Rep. 5.

<sup>5</sup> *Witters v. Sowles*, 82 Fed. Rep. 765, 766.



no doubt that testimony exists as to them, the cause may be remanded by the appellate court with directions to take further testimony on such points.<sup>1</sup>

**§ 550. Proof at the hearing.**—Proof at the hearing is usually confined to verification of exhibits.<sup>2</sup> Ordinarily no exhibit can be proved at the hearing by witnesses if it requires more evidence than the mere proof of its execution, or of handwriting, to substantiate it.<sup>3</sup> A will cannot be so proven because the sanity of the testator and other requisites under the statute must be proved.<sup>4</sup>

<sup>1</sup> Fuller v. Fuller, 28 Fla. 236; s. c., 2 So. Rep. 426; Beckmann v. Hoboken Bank, 87 N. J. Eq. 95; Gordon v. Tweedy, 74 Ala. 283, 286.

<sup>2</sup> See § 520, *supra*; Hoffman's Ch. Pr. (2d ed.) 490; Railroad Co. v. Drew, 3 Woods, 692; De Butts v. Bacon, 1 Cranch, 569; Graves v. Budget, 1 Atk. 444. See, also, Mills v. Pittman, 1 Paige, 490. Leave to prove exhibits *viva voce* may be granted on a rehearing, Walker v. Symonds, 1 Mer. 37, n.; Dale v. Roosevelt, 6 Johns. Ch. 256; or on appeal, Higgins v. Mills, 5 Russ. 287. Such evidence may be placed upon record by a bill of exceptions. Gafney v. Reeves, 6 Ind. 71. A deed charged in the bill and admitted in the answer may be read at the hearing without having been made an exhibit before the master. Dey v. Dunham, 2 Johns. Ch. 182. For a definition of exhibits, see Gresley's Eq. Ev. 146, n.; quoted in Gibson's Suits in Chancery, § 466, n. 9. Lord Clarendon prescribed that a special order of the court must be obtained, for leave to prove an exhibit, after due notice to the adverse party; but Chancellor Kent, in Consequa v. Fanning, 2 Johns. Ch. 483, sanctioned the practice of giving notice of intention to prove without an order.

<sup>3</sup> Gibson's Suits in Chancery, § 466;

Hoffman's Ch. Pr. (2d ed.) 490; 3 Greenleaf on Evidence (15th ed.), § 310; Ellis v. Deane, 8 Moll. 68; Graves v. Budget, 1 Atk. 444; Bloxton v. Drewitt, Prec. Ch. 64; Harris v. Ingledew, 3 P. Wms. 91, 93; Eade v. Lingood, 1 Atk. 203; Barfield v. Kelley, 4 Russ. 355; Maber v. Hobbs, 1 Y. & C. 585; Lake v. Skinner, 1 Jac. & W. 9.

<sup>4</sup> Hoffman's Ch. Pr. (2d ed.) 490; Eade v. Lingood, 1 Atk. 203; Niblett v. Daniel, Bunb. 810; Pomfret v. Lord Windsor, 2 Ves. Sr. 473. "The examination of the witnesses is restricted, at the hearing, ordinarily to three or four very simple points, such as (1) the custody and identity of an ancient document, produced by its custodian; (2) the accuracy of an office copy by the proper officer; (3) the execution of a deed or other writing by the attesting witness, and (4) the handwriting of a letter, receipt, note or other writing. The court may ask the witness questions suggested by adverse counsel, and a limited cross-examination may be allowed. Gresley's Eq. Ev. 188; 1 Daniell's Ch. Pr. (5th ed.) 882, 883; Consequa v. Fanning, 2 Johns. Ch. 481. If, however, the court should see that the adverse party is surprised by the introduction of *viva voce* evidence, and that a cross-examination would not be



§ 551. **The same subject continued.**—It is the inherent and peculiar right of the judge of a court of chancery to require further proof upon any point under his consideration, without the motion and even against the will of the parties, and although the matters of which he would inquire have not been put in issue by the pleadings.<sup>1</sup> This right may be exercised by examining witnesses *viva voce* in open court, and is employed in cases of contempt,<sup>2</sup> and in questions as to the proper custody of a ward;<sup>3</sup> and “in other cases of emergency immediately addressed to the discretion of the judge, or upon which he entertains doubt.”<sup>4</sup>

§ 552. **Letters rogatory.**—Where the government of a foreign country refuses to permit the execution of a commission to examine witnesses therein, a course has been adopted from a practice known in the civil law of issuing what are termed letters rogatory, or, as they are sometimes called, requisitory.<sup>5</sup> “The court of chancery has always freely exercised this power by a commission either directed to foreign magistrates by their official designation, or more usually to individuals by name, which latter course the peculiar nature of its jurisdiction and proceedings enables it to induce the parties to adopt by consent where any doubt exists as to its

sufficient to enable the adverse party to test the authenticity or genuineness of an exhibit, the hearing of the cause should be suspended, and proof allowed to be taken as to the authenticity or genuineness of such exhibit.” Gibson’s Suits in Chancery, § 466.

<sup>1</sup>8 Greenleaf on Evidence (15th ed.), § 880; Parker v. Whitby, T. & R. 871. It was held in Dixon v. Higgins, 82 Ala. 284; s. c., 2 So. Rep. 289, that the rule of the chancery practice of Alabama which provides that, “after publication passed, no testimony shall be taken except by consent, or by special application to the chancellor, and allowance by him,” operates only on the rights of the parties, leaving unabridged the chancellor’s discretion to order such

additional testimony for the information of his conscience.

<sup>2</sup>Moore v. Aylett, Dick. 643; Gacygne’s Case, 14 Ves. 183; Turner v. Burleigh, 17 Ves. 354.

<sup>3</sup>*Ex parte* Bates, Gresley’s Equity Ev. 494.

<sup>4</sup>8 Greenleaf on Evidence (15th ed.), § 881, citing Bishop v. Church, 2 Ves. 100, 106; *Ex parte* Lord, 2 Ves. 26; Bank v. Farque, Ambler, 145; Barnes v. Smart, 1 Y. & Col. 139; Margareson v. Saxton, 1 Y. & Col. 532. See, also, United States Equity Rule 78; *In re* Clarke, 9 Blatchf. 872; Farrall v. Davenport, 5 L. T. (N. S.) 486.

<sup>5</sup>Hoffman’s Ch. Pr. (2d ed.) 482; Nelson v. United States, 1 Pet. C. C. 236, note a, containing a form; Cunningham v. Otis, 1 Gall. 166.

inherent authority.<sup>1</sup> A special application for letters rogatory is necessary, but they may be allowed to issue without sending a previous commission upon satisfactory proof of the fact that the authorities would not permit its execution.<sup>2</sup> "The writ or commission is usually accompanied by interrogatories filed by the parties on each side to which the answers of the witnesses are desired. The commission is executed by the judge who receives it either by calling the witness before himself or by the intervention of a commissioner for that purpose, and the original answers, duly signed and sworn to by the deponent and properly authenticated, are returned with the commission to the court from which it issued."<sup>3</sup>

<sup>1</sup> 1 Greenleaf on Evidence (15th ed.), 820.

<sup>2</sup> 1 Greenleaf on Evidence (15th ed.), § 820.

<sup>3</sup> Hoffman's Ch. Pr. (2d ed.) 482.

## CHAPTER XVII.

### MISCELLANEOUS PROCEEDINGS.

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| <p>§ 553. Interlocutory applications.<br/>554. Motions.<br/>555. Who may make a motion.<br/>556. Motion by a party in contempt.<br/>557. Motions of course.<br/>558. Special motions <i>ex parte</i>.<br/>559. Notice of motions — Federal rules.<br/>560. Form and notice of motions.<br/>561. The same subject continued — Form of notice.<br/>562. Renewal of motions.<br/>563. Hearing of motions.<br/>564. Definition and nature of petitions.<br/>565. Use of petitions illustrated.<br/>566. When a bill is necessary.<br/>567. Verification of a petition.<br/>568. Form of a petition.<br/>569. Notice of petitions.<br/>570. Hearing of petitions.<br/>571. Petitions of intervention — General right to intervene.<br/>572. Intervention by strangers.<br/>573. The same subject continued.<br/>574. Intervention by beneficiaries.<br/>575. Intervention by stockholders as defendants in the federal courts.<br/>576. Intervention on a creditor's bill.<br/>577. The same subject continued.<br/>578. Intervention as a defendant.<br/>579. Requisites of a petition to intervene.<br/>580. When an intervention becomes effective.<br/>581. Consolidation of causes—(a) In the federal courts.</p> | <p>§ 582. (b) In West Virginia, Georgia and Indiana.<br/>583. (c) In Wisconsin.<br/>584. (d) In New Jersey and Alabama.<br/>585. (e) In Tennessee.<br/>586. Stipulations relating to causes, when enforced.<br/>587. The same subject continued.<br/>588. Scope of stipulations limited.<br/>589. Who are bound by stipulations.<br/>590. The same subject continued — Effect upon infant parties.<br/>591. Construction of stipulations — Parol evidence.<br/>592. Discharging a party from stipulations.<br/>593. Orders — Who may grant orders.<br/>594. Service of orders.<br/>595. Proceedings touching irregularities.<br/>596. Terms of orders — <i>Nunc pro tunc</i> orders.<br/>597. Modifying and vacating orders.<br/>598. Nature and use of affidavits.<br/>599. Title of an affidavit.<br/>600. Form of an affidavit.<br/>601. Scandal and impertinence in affidavits.<br/>602. Substance of affidavits.<br/>603. Paying money into court.<br/>604. The same subject continued.<br/>605. Conduct of the cause.<br/>606. Staying suits to await payment of costs in former suits.</p> |
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§ 553. **Interlocutory applications.**—An interlocutory application is a request made to the court for its interference in a matter arising in the progress of a cause or proceeding, and it may either relate to the process of the court, or to the protection of the property in litigation *pendente lite*, or to any other matter upon which the interference of the court is required at any time. Applications of this nature are either made orally or in writing. In the former case they are called motions, in the latter petitions.<sup>1</sup>

§ 554. **Motions.**—A motion is an application, either by a party to the proceedings or his counsel, not founded upon any written statement addressed to the court.<sup>2</sup> But a rule of the United States Supreme Court provides that “All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.”<sup>3</sup> A motion is either of course or special. Special motions are either *ex parte* or upon notice.<sup>4</sup>

§ 555. **Who may make a motion.**—A motion may be made by or on behalf of any party to the record, provided such party is not in contempt.<sup>5</sup> A person not a party to the record

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1587; 2 Barbour's Ch. Pr. (2d ed.) 565.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1591. See, also, 15 Am. & Eng. Encyc. of Law, p. 887, tit. “Motions.”

<sup>3</sup> Rule 6 of the Supreme Court; Rule 21 of the United States Circuit Court of Appeals. Such a rule does not apply to motions of course. *Johnson v. Ableman*, 35 Ill. 265.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1592; 2 Barbour's Ch. Pr. (2d ed.) 566. In suits for specific performance, if the title is the only question in dispute, the court may refer it to a master upon motion. *Moss v. Matthews*, 8 Ves. 279; *Wright v. Bond*, 11 Ves. 89; *Gompertz v. —*, 12 Ves. 17; *Balmanno v. Lumley*, 1 Ves. & B. 224. And upon a report adverse to the title the bill may be dismissed on motion. *Walters v. Pyman*, 19 Ves. 851; *Whitcomb v. Foley*,

*Mad. & Geld. 8*. A notice is not such a proceeding as will be set aside on motion, although irregular. *Mutual Safety Ins. Co. v. Roberts*, 4 Sandf. Ch. 592. If the court learns from any source that its process is not being properly executed it may of its own motion interfere temporarily so that the matter can be inquired into. *Chamberlain v. Larned*, 32 N. J. Eq. 295. Further directions are not given on motion. They can only be had upon a hearing after a master's report or upon the cause coming on again for the purpose, in pursuance of a former order or decree. The court can then add to the latter, but not so as to materially affect or vary the first decree. *Gardner v. Dering*, 2 Edw. Ch. 131.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 1591. See § 556, *infra*. An attachment issued against a party, after he has

cannot, in general, be allowed to make a motion in a cause, except to be made a party.<sup>1</sup> Thus an injunction against a defendant to restrain him from receiving a sum of money in the hands of his attorney, or from permitting it to be paid to any one for him or on his behalf, will not be dissolved on motion of a creditor of the defendant, not a party to the suit.<sup>2</sup> But a person who is *quasi* a party to the record, such as a claimant coming in under a decree, or a purchaser of an estate sold by order of the court, may apply to the court by motion.<sup>3</sup>

§ 556. Motion by a party in contempt.— The general rule is that one who is in contempt is never to be heard by motion or otherwise until he has cleared his contempt and paid the costs.<sup>4</sup> But the rule applies to matters of favor, and a party, although adjudged in contempt, may be heard on matters of strict right.<sup>5</sup>

served a notice of motion, but before the motion made, will not prevent his making it. *Jeyes v. Foreman*, 6 Sim. 384.

<sup>1</sup> *Ross v. Titworth*, 37 N. J. Eq. 333, 339; *Linn v. Wheeler*, 21 N. J. Eq. 231; *Belbee v. Belbee*, 6 Mad. 28.

<sup>2</sup> *Linn v. Wheeler*, 31 N. J. Eq. 231. But see *Tradesman's Bank v. Merritt*, 1 Paige, 302; *Bourband v. Bourband*, 21 W. R. 1024; *Speak v. Ransom*, 2 Tenn. Ch. 210; *Dalglish v. Jarvie*, 2 Macn. & G. 231.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1591; *Jones v. Roberts*, 12 Sim. 189; *Earl of Portarlington v. Damer*, 2 Phil. 264. See *Ewing v. Maury*, 8 Lea, 331; *Majors v. McNeilly*, 7 Heisk. 299. *Deaderick v. Smith*, 6 Humph. 188, requires the purchaser to apply by petition. See, also, *Gibson's Suits in Chancery*, § 774 *et seq.*, for the practice in Tennessee.

<sup>4</sup> *Freese v. Swayze*, 26 N. J. Eq. 437; *Ellingwood v. Stevenson*, 1 Sandf. Ch. 366; *Johnson v. Pinney*, 1 Paige, 646; *Rogers v. Patterson*, 4 Paige, 450; *Evans v. Van Hale*, Clarke's Ch. 17; *Brinkley v. Brinkley*, 47 N. Y. 40; *Lane v. Ellzey*, 4 Hen. & M. (Va.) 504.

<sup>5</sup> *Morrison v. Morrison*, 5 Hare, 590; s. c., 30 Eng. Ch. Rep. 589, n.; *Chuck v. Cremer*, 1 Coop. Ch. 205, where many cases are collected in a note; *Brinkley v. Brinkley*, 47 N. Y. 40, where the subject is discussed at considerable length by Judge Folger, and the following conclusion drawn from the cases cited above and in the preceding note:—"A party in contempt and until he is purged of it will not be permitted to ask for the favor of the court nor to take any aggressive proceeding against his adversary; but that it is his right to take measures to protect himself and to make any motion designed to show that the order adjudging him in contempt was erroneous. He may move to discharge an order, though in contempt for not obeying it." As to this point see *O'Dell v. Hart*, 1 Moll. 492; *Barker v. Dawson*, cited in 1 Coop. Ch. 207. "And if a party may move to set aside or discharge an order as erroneous to rid himself of contempt," continued Judge Folger in *Brinkley v. Brinkley*, *supra*, "he may, it must follow, take any other course which the law allows to a party to establish

§ 557. **Motions of course.**—A motion of course is where, by a standing rule or the known course of the court, the object of it is granted upon asking for it, and without hearing both sides. No notice of such a motion is necessary, as the court will not hear any defense to it.<sup>1</sup> Motions of course are entered in the clerk's office without any action of the judge in person.<sup>2</sup> The United States Equity Rules provide that the clerk's office shall be open and the clerk shall be in attendance therein on the first Monday of every month, for the

that it is erroneous; and an appeal from and a review of it in an appellate court is such other course,"—citing *Stone v. Byrne*, 5 Bro. P. C. 209; *People v. Sturtevant*, 9 N. Y. 263. See, generally, as supporting the text, *Green v. Green*, 2 Sim. 394, 430; *Ellice v. Walmsley*, 1 Coop. Ch. 207; *Parry v. Perryman*, 1 Coop. Ch. 208; *Needham v. Needham*, 1 Coop. Ch. 208; *Wilson v. Bates*, 3 Myl. & Cr. 201; *Ricketts v. Mornington*, 7 Sim. 200; *Vowles v. Young*, 9 Ves. 178; *Anon.*, 15 Ves. 175; *Hill v. Bissel*, *Mosely*, 258; *In re Brady*, 1 Moll. 254; *Howard v. Newman*, 1 Moll. 221; *Hawkins v. Hall*, 1 Beav. 78; *Anon. v. Lord Gort*, 1 Hog. 77; *Valle v. O'Reilly*, 1 Hog. 199; *Morrison v. Morrison*, 4 Hare, 590; *Wilson v. Metcalfe*, MSS., cited in 1 Daniell's Ch. Pr. (5th ed.) 506; *Herring v. Cloberry*, 12 Sim. 410; *Lord Wenman v. Osbaldeston*, 2 Bro. P. C. 276; *Hall v. Darney*, 1 Dick. 289; *Hewitt v. McCartney*, 18 Ves. 560; *McCallum v. Beale*, 10 Price, 180; *Howard v. Newman*, 1 Moll. 221; *Lord Cranston v. Goldsbede*, 2 Y. & Coll. (Exch.) 70; *Best v. Gompertz*, 2 Y. & Coll. (Exch.) 582; *Petty v. Lonsdale*, 2 Myl. & Cr. 545, where defendant in contempt for not answering obtained an order referring the bill for impertinence, which was held to be clearly irregular, *Clark v. Dew*, 1 Russ. & Myl. 107; *Bishop of Derry v. Tyler*, 2 Y. & Coll.

(Exch.) 71; *Everett v. Prytherych*, 12 Sim. 868; *Turner v. Dorgan*, 12 Sim. 504; *Cattell v. Simons*, 6 Beav. 304. Where the contempt was the non-performance of a final decree for the payment of money, and the contemner appeared before the court on an order to show cause why an attachment for contempt should not be issued against him, declaring his readiness to comply with the directions of the decree at once, and to answer for his contempt as the court should direct, he was heard on application to open the decree and to be let in to answer on the ground of surprise. *Freese v. Swayze*, 26 N. J. Eq. 487.

<sup>1</sup> 2 Barbour's Ch. Pr. (2d ed.) 567. "Looking through the equity rules it will be found that a distinction is preserved between special motions and those grantable of course. What constitutes a motion grantable of course and a special motion is to be inferred from Rule 5 in Equity. The distinction is that a motion which requires an allowance from the judge or a notice to the opposite party is a special one; all others are grantable of course." *McAllister, J.*, in *United States v. Parrott*, 1 McAll. 447, 454. See, also, *Halderman v. Halderman*, *Hemp*. 407.

<sup>2</sup> *Robinson v. Satterlee*, 8 Sawy. 184, 141.

purpose of receiving, entering, entertaining and disposing all motions, rules, orders and other proceedings which are grantable of course, and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules prescribed.”<sup>1</sup> “All motions, rules, orders and other proceedings made and directed at chambers, or on rule-days at the clerk’s office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk’s office, on the day when they are made and directed, which book shall be kept open at all office hours to the free inspection of the parties in any suit in equity and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further notice thereof, of all orders, rules, acts, notices and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors.”<sup>2</sup> “All motions and applications in the clerk’s office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk’s office which do not by the rules hereinafter prescribed require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended or altered or rescinded by any judge of the court upon special cause shown.”<sup>3</sup> In the federal courts an order dismissing a bill for want of a replication under the rule<sup>4</sup> may be entered as of course.<sup>5</sup> A motion for the appointment of commissioners to take testimony abroad is not of course.<sup>6</sup> A continuance of a motion to dissolve an injunction is not granted as of course.<sup>7</sup>

<sup>1</sup> Equity Rule 2.

<sup>2</sup> Equity Rule 4.

Equity Rule 5.

<sup>4</sup> Equity Rule 66.

<sup>5</sup> Robinson v. Satterlee, 8 Sawy. 184, 141; 8 Daniell’s Ch. Pr. (1st ed.) 249.

<sup>6</sup> United States v. Parrott, 1 McAll. 447.

<sup>7</sup> Taylor v. Dickinson, 15 Iowa, 483. A party is not compelled to disregard an order of course which has been irregularly entered by the adverse party, and which the latter re-



§ 558. **Special motions ex parte.**—A special motion is one which it is not a matter of course to grant, but which requires some ground to be laid for it, either by previous order, or by the pleadings in the cause, or by affidavits.<sup>1</sup> Special motions are made either *ex parte* or upon notice to the opposite party. When they are made *ex parte* they must be supported by affidavit.<sup>2</sup> Where an order is made by which a particular act is to be done, unless the other party shall within a certain time show cause to the contrary (which order is usually termed an order *nisi*), the party obtaining the order must, after the expiration of the time limited by it, if no cause is shown, move for another order to confirm the previous order *nisi* absolute. The motion in this case requires no notice; but it must be supported by an affidavit to prove the due service of the order *nisi*.<sup>3</sup> Where there is no danger that the object of the motion would be defeated if notice were given, an *ex parte* motion will not be permitted.<sup>4</sup> A *ne exeat* may issue on an *ex parte* motion.<sup>5</sup>

§ 559. **Notice of motions—Federal rules.**—The United States Equity Rules provide that “all motions for rules or orders and other proceedings which are not grantable of course or without notice shall, unless a different time be assigned by a judge of the court, be made on a rule-day and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party or his solicitor shall not then appear or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte* and granted, as if not objected to or refused, in his discretion.”<sup>6</sup> “Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the

fuses to waive; but he may apply to the court to discharge the same and in the meantime may suspend proceedings which are inconsistent therewith. *Osgood v. Joslin*, 8 Paige, 195.

<sup>1</sup> 3 Daniell's Ch. Pr. (1st ed.) 252;

<sup>2</sup> 2 Barbour's Ch. Pr. (2d ed.) 567.

<sup>3</sup> 3 Daniell's Ch. Pr. (1st ed.) 252.

<sup>4</sup> 3 Daniell's Ch. Pr. (1st ed.) 253;

<sup>5</sup> 2 Barbour's Ch. Pr. (2d ed.) 568.

<sup>6</sup> 3 Daniell's Ch. Pr. (1st ed.) 252; 2 Barbour's Ch. Pr. (2d ed.) 568. In *Pratt v. Rice*, 7 Nev. 128, the refusal to vacate an order granted on motion without notice, the motion involving ascertainment of very material facts, was held to be error.

<sup>7</sup> *Collison v. —*, 18 Ves. 858.

<sup>8</sup> Equity Rule 6.

rule-days at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party or his solicitor to appear and show cause to the contrary at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing."<sup>1</sup> "Except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors without further service thereof of all orders, rules, acts, notices and other proceedings entered in such order-book touching any and all matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings not requiring personal service on the parties, in their discretion."<sup>2</sup> All notices of motion for any process of contempt or commitment must be served personally upon the party to be affected by it, unless an order has been previously obtained for substituted service.<sup>3</sup> The application for substituted service is made by *ex parte* motion supported by affidavit.<sup>4</sup>

§ 560. Form and notice of motions.—A motion may include several objects, such as the appointment of a receiver,

<sup>1</sup> Equity Rule 8.

<sup>2</sup> Equity Rule 4. "It is believed that no authorities can be produced proving that notice of the motion is required in any case where the parties to be affected by the appointment of a receiver are in court represented by counsel who appear in resistance of the motion." McLean v. Lafayette Bank, 3 McLean, 503, 504, holding that such a motion is not embraced in the language of

Equity Rule 8. See St. Louis &c. Ry. Co. v. Dewees, 23 Fed. Rep. 691, 694.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1595.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1596. The name of a defendant cannot be struck out of a bill on motion of a co-defendant without his consent or notice to him of the application. Livingston v. Gibbons, 4 Johns. Ch. 94.

an injunction and the payment of money into court.<sup>1</sup> Parties moving for more than they are entitled to will be ordered to pay costs of the opposing motion.<sup>2</sup> If a person makes separate motions for objects which clearly could have been granted on a single motion, he will be required to pay the extra costs.<sup>3</sup> No person ought to join in a notice of motion who is not interested in the result of the application.<sup>4</sup> Costs are not given to the party moving where the opposite party fails to appear, unless asked for in the notice of motion.<sup>5</sup> It is usual to name in the notice the judge before whom the motion is to be made.<sup>6</sup> Papers upon which the application is made should be attached to the notice, which ought to specify that the motion will be founded thereon.<sup>7</sup> If it is founded on pleadings or other papers on file, the notice should specify such papers particularly.<sup>8</sup> Where the object is to discharge an order for irregularity, it is usual to state the ground of the application.<sup>9</sup>

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1594, 1595.

<sup>2</sup> North American Coal Co. v. Dyett, 2 Edw. Ch. 115. See, also, Lancashire v. Lancashire, 9 Beav. 120; Moet v. Conston, 83 Beav. 578; Sturch v. Young, 5 Beav. 557. No order for payment of costs will be made on an *ex parte* application. Nokes v. Gibbon, 8 Jur. (N. S.) 282; Cast v. Poyser, 26 L. J. Ch. 858.

<sup>3</sup> Hawke v. Kemp, 2 Beav. 288.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1595; Folland v. Lamotte, 10 Sim. 486. One defendant who answers separately may move to expedite the suit notwithstanding his solicitor is retained by other defendants. De Luze v. Loder, 3 Edw. Ch. 419.

<sup>5</sup> 2 Barbour's Ch. Pr. (2d ed.) 570. See, also, Mann v. King, 18 Ves. 297; Banta v. Marcellus, 2 Barb. 378; Pratt v. Walker, 19 Beav. 261. The rule does not apply where both parties appear. 2 Daniell's Ch. Pr. (5th ed.) 1600; Clark v. Jacques, 11 Beav. 623; Butler v. Gardener, 12 Beav. 525; Powell v. Cockerell, 4 Hare, 572.

<sup>6</sup> 2 Daniell's Ch. Pr. (5th ed.) 1595.

<sup>7</sup> 2 Barbour's Ch. Pr. (2d ed.) 570.

<sup>8</sup> 2 Barbour's Ch. Pr. (2d ed.) 570.

<sup>9</sup> 2 Daniell's Ch. Pr. (2d ed.) 1594; Brown v. Robertson, 2 Phil. 178. See, also, Lambert v. Hill, 1 Dr. & War. 74; Alexander v. Easton, 1 Caines, 152; Jackson v. Stiles, 1 Cowen, 184, 135, note. But a rule of practice requiring a notice of motion to specify the particular points intended to be insisted on is only applicable to cases where the opposite party has a right to explain or answer the matters of the objections by affidavit, or to cases where, by the practice of the court, the opposite party has a right to amend or to perfect his defective proceedings on proper terms. Hanna v. Curtis, 1 Barb. Ch. 263. As to what constitutes compliance with such a rule, see Graham v. Pinckney, 7 Rob. 147; Harder v. Harder, 26 Barb. 409; Blake v. Locy, 6 How. Pr. 108; Kellogg v. Shafer, 14 Abb. 149; Jackson v. Smith, 16 Abb. 201; Winebrenner v. Edgerton, 30 Barb. 185; Bowman v. Sheldon, 5 Sandf. 660; Hanna v. Curtis, 1 Barb. Ch. 263.

§ 561. **The same subject continued — Form of notice.**— A notice of motion must be properly entitled in the cause or matter in which the application is to be made.<sup>1</sup> It must be dated and addressed to the solicitor of the opposite party or to the party himself if personal service is intended.<sup>2</sup> If a party has appeared by a solicitor all notices must be signed by the latter.<sup>3</sup> Notice of motion given “on behalf of the relator” in an information by the attorney-general was held irregular; it should be on behalf of the attorney-general.<sup>4</sup> Notices on behalf of an infant,<sup>5</sup> or a married woman without her husband,<sup>6</sup> or other person under disability, must be made by a next friend, and if the person exercising that function on the record declines to join in the motion a next friend must be named for the purpose.<sup>7</sup> The notice should state the day, place and hour at which the motion will be made.<sup>8</sup> The better course is to state that the motion will be made “at the opening of the court on that day, or as soon thereafter as counsel can be heard.”<sup>9</sup> It should state clearly the terms of the order asked for.<sup>10</sup> And it is usual to add a prayer for general relief,—“and for such further or for such other order or relief as the court may think proper to grant,” under which a party may have general relief upon the same principles that apply to a prayer for general relief in a bill.<sup>11</sup> Where a motion is to be made by leave of the court the notice ought to mention that it is to be so made; otherwise the party served may disregard it.<sup>12</sup>

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1594; 2 Barbour's Ch. Pr. (2d ed.) 570; Rowlatt v. Cattell, 2 Hare, 186; Solomon v. Stalman, 4 Beav. 248; Davis v. Barrett, 7 Beav. 171; Pollard v. Doyle, 2 W. R. 509.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1594; Moody v. Heberd, 11 Jur. 941; Hutchinson v. Horner, 9 Jur. 615; 2 Barbour's Ch. Pr. (2d ed.) 570.

<sup>3</sup> Halsey v. Carter, 6 Rob. 535; Webb v. Dill, 18 Abb. Pr. 264, holding that the New York code has not changed this practice.

<sup>4</sup> Attorney-General v. Wright, 3 Beav. 447. See Parker v. State (Ind.), 88 N. E. Rep. 119.

<sup>5</sup> Pidduck v. Boulton, 2 Sim. (N. S.) 228.

<sup>6</sup> Pearce v. Cole, 16 Jur. 214.

<sup>7</sup> 2 Daniell's Ch. Pr. (5th ed.) 1595; Cox v. Wright, 9 Jur. (N. S.) 981. See, also, Guy v. Guy, 2 Beav. 460; Furtado v. Furtado, 6 Jur. 227.

<sup>8</sup> 2 Barbour's Ch. Pr. (2d ed.) 570. See Bodwell v. Wilcox, 2 Caines, 104; Anon., 1 Johns. 143.

<sup>9</sup> 2 Barbour's Ch. Pr. (2d ed.) 570.

<sup>10</sup> 2 Barbour's Ch. Pr. (2d ed.) 570; Mann v. King, 18 Ves. 297.

<sup>11</sup> 2 Barbour's Ch. Pr. (2d ed.) 576.

<sup>12</sup> Hill v. Rimell, 8 Sim. 632; Jackson v. Wilkins, 6 Beav. 607.

§ 562. **Renewal of motions.**—After an order denying an application upon the merits has been confirmed by the appellate court, it is erroneous for the trial court to permit the former motion to be renewed and to grant the application.<sup>1</sup> A motion which has been once heard and decided cannot be renewed unless on a new ground and by leave of court.<sup>2</sup> A motion cannot be renewed until the costs of a previous motion to the same effect, which was not brought on, are paid.<sup>3</sup>

§ 563. **Hearing of motions.**—It is the practice to give preference to *ex parte* motions, in the order of hearing, over such as are opposed.<sup>4</sup> The course of proceeding, where both parties appear, is for the counsel who makes the motion to read the notice of motion, with the affidavit or admission of service, and the other papers upon which the motion is founded. Then, if there are any papers to be used upon the other side, they are read by the counsel for the opposing party. The counsel for the moving party opens and closes the argument.<sup>5</sup> Upon the hearing of a motion against a third person who is not a party to the suit, the pleadings and other proceedings in the cause cannot be used if they have not been served on such person with the notice of the motion.<sup>6</sup> The mere absence of counsel at the hearing of a motion is not necessarily equivalent to a consent thereto.<sup>7</sup> On a motion to discharge an alleged irregular order, no parties can be heard in support of the application but those who have joined in

<sup>1</sup> *Dodd v. Astor*, 2 Barb. Ch. 395.

<sup>2</sup> *Hoffman v. Livingston*, 1 Johns. Ch. 211; *Dodd v. Astor*, 2 Barb. Ch. 395; *Fenton v. Lumberman's Bank*, Clarke's Ch. 360. Not upon mere cumulative evidence. *Ray v. Connor*, 3 Edw. Ch. 478.

<sup>3</sup> *Bellchamber v. Giani*, 3 Mad. 550.

<sup>4</sup> 2 Barbour's Ch. Pr. (5th ed.) 574.

<sup>5</sup> 2 Barbour's Ch. Pr. (2d ed.) 579. But where a party moves to dissolve an injunction *nisi*, the complainant shows cause upon the merits confessed in the answer. Then no reply is allowed; the motion for the order *nisi* being considered as the appli-

cation, to which the complainant answers, by showing cause upon the merits. After this the defendant's counsel is allowed to argue against the cause shown by the complainant, and this is considered as the reply. 2 Daniell's Ch. Pr. (2d ed.) 1799.

<sup>6</sup> *Morley v. Green*, 11 Paige, 240.

<sup>7</sup> *Bound v. South Carolina Ry. Co.*, 46 Fed. Rep. 315; *Like v. Berresford*, 8 Bro. C. C. 366; *Skinner's Co. v. Irish Society*, 1 M. & C. 162; *Tullett v. Armstrong*, 1 Keen, 428. See *Bailey v. Ford*, 18 Sim. 495; *United States Equity Rule 6*, quoted in § 559, *supra*.

the notice of motion.<sup>1</sup> But all persons interested in the report of a master have a right to support his findings and are entitled to be heard in proceedings tending to disturb it.<sup>2</sup> It is the practice to confine a party to the objections specified in his notice.<sup>3</sup> But it has been held that a party may have an order discharged for irregularity, although the notice does not state it as an objection; the omission being material only as to costs.<sup>4</sup>

§ 564. **Definition and nature of petitions.**—A petition is a written request, addressed to the chancellor, setting forth some matter of fact or ground of complaint as to which the petitioner prays the chancellor to make some order or give some direction.<sup>5</sup> It is ordinarily used for interlocutory purposes, and as a general rule cannot be presented in a cause until the bill has been filed.<sup>6</sup> Petitions may be presented either in a cause or in a matter over which the court has jurisdiction under some act of the legislature or under special authority.<sup>7</sup> It was said by Lord Erskine that there are no precise boundaries between motions and petitions as they are applied to carry into effect decrees and orders.<sup>8</sup> Most things

<sup>1</sup> *Stubbs v. Sargon*, 8 Beav. 408.

<sup>2</sup> *Johnston v. Todd*, 5 Beav. 394.

<sup>3</sup> *Alexander v. Esten*, 1 Caines, 152. See, also, *Jackson v. Stiles*, 1 Cowen, 184. As a general rule, where notice of a motion is given, or where an order to show cause is obtained and served upon the adverse party, and he neglects to appear and oppose the application, the specific relief mentioned in the notice or order and no other will be granted. But if the adverse party appears to oppose the application, and the applicant is not entitled to the particular relief specified, the court, under the alternative part of the notice or order, may give him such further or other relief as he may be entitled to upon the facts of the case. *Rogers v. Toole*, 11 Paige, 212.

<sup>4</sup> *Brown v. Robertson*, 2 Phillips' Ch. 173.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 1603; Gibson's Suits in Chancery, § 774.

"A petition, in common phrase, is a request in writing, and in legal language describes an application to a court in writing in contradistinction to a motion, which may be made *viva voce*." Per Folger, J., in *Shaft v. Phoenix Mut. L. Ins. Co.*, 67 N. Y. 544, 547. See, also, *Bergen v. Jones*, 4 Met. 871.

<sup>6</sup> *Receiver &c. v. First Nat. Bank*, 84 N. J. Eq. 450, 457; 2 Barbour's Ch. Pr. (2d ed.) 579. See, also, *Codwise v. Gelston*, 10 Johns. 531. "It is improper when a stranger to the suit desires to present new claims and raise new issues not involved in the original cause, though in respect to the subject-matter of the suit." *Renfro v. Goetter*, 78 Ala. 811, 813.

<sup>7</sup> 2 Daniell's Ch. Pr. (1st ed.) 157.

<sup>8</sup> *Lord Shipbrooke v. Lord Hinch-*

which may be moved for of course may also be obtained as of course upon petition.<sup>1</sup> It has been held that whether relief shall be sought by petition or by bill when it grows out of matters involved in a pending suit rests in the sound discretion of the court.<sup>2</sup> A petition may be presented by any person, whether a party to a suit or not.<sup>3</sup>

**§ 565. Use of petitions illustrated.**—Where a dispute arises between the complainant and defendant as to what the decree in the suit embraces, the matter in difference may be presented by petition.<sup>4</sup> A master's sale may be set aside by the court in a proper case on petition of the complainant, though the purchaser was not a party to the suit. By becoming a purchaser he subjects himself to the jurisdiction of the court.<sup>5</sup> An order to stay proceedings in a pending cause must be obtained on petition;<sup>6</sup> and maintenance will be allowed to an infant without a bill.<sup>7</sup>

**§ 566. When a bill is necessary.**—Where a decree in favor of a defendant upon his cross-bill was expressed to be without prejudice to an inquiry from matters arising since the bill was filed, it was held that the complainant could have the benefit of such new matter by bill and not by petition.<sup>8</sup> In a

ingbrook, 18 Ves. 393. A party ought to apply by petition when a long statement of facts is necessary to show his title. *Jones v. Roberts*, 12 Sim. 189.

<sup>1</sup> 8 Daniell's Ch. Pr. (1st ed.) 157.

<sup>2</sup> *Foscue v. Lyon*, 55 Ala. 441, holding that if a supplemental cross-bill is filed when a petition would be proper, a demurrer to it may be overruled and the cross-bill itself be treated as a petition. See, also, *Kelsey v. Hobby*, 16 Pet. 269, 277; *Coburn v. Cedar Valley Coal & Land Co.*, 188 U. S. 196, 222.

<sup>3</sup> 2 Barbour's Ch. Pr. (2d ed.) 579. See *Livingston's Petition*, 32 How. 20; s. c., 34 N. Y. 555; *Jones v. Roberts*, 12 Sim. 189; *Barker v. Todd*, 15 Fed. Rep. 265, where the court, upon being informed by the petition of

strangers to the record that its decree was obtained by collusion and without any real controversy, annulled the same and dismissed the suit.

<sup>4</sup> *Crane v. Brigham*, 11 N. J. Eq. 29.

<sup>5</sup> *National Bank v. Sprague*, 21 N. J. Eq. 458. See, also, *Mutual L. Ins. Co. v. Goddard*, 33 N. J. Eq. 482; *Campbell v. Gardner*, 11 N. J. Eq. 423.

<sup>6</sup> *Dyckman v. Kernochan*, 2 Paige, 26.

<sup>7</sup> *Ex parte Salter*, 3 Bro. C. C. 500; 8 Daniell's Ch. Pr. (1st ed.) 157.

<sup>8</sup> The court, in affirming the greater convenience and efficacy of a bill in such cases, said: — "This certainly is infinitely more desirable than to proceed against him by simple petition, which is nothing more than a motion in writing, and which he could



suit by a receiver of an insolvent bank to recover moneys of the bank received by one of its creditors subsequently to his appointment, it was held that the complainant could have no relief by petition, but only by bill, and that the fact of his being an officer of the court entitled him to no privilege not accorded to other suitors.<sup>1</sup>

§ 567. **Verification of a petition.**— With regard to the verification of a petition it was said by Judge Folger<sup>2</sup> that “there is nothing in the thing itself nor in the naming of it by its name alone in a statute which demands that it should be verified. Doubtless the general rule is to verify a petition, though often this is required by standing rules of court rather than by force of the term itself or the exigency of the statute.”<sup>3</sup>

§ 568. **Form of a petition.**— A petition in a cause should be properly entitled in the cause.<sup>4</sup> When it is presented in some collateral matter, or there is no suit pending, it is entitled “In the Matter of A. B.,” etc.<sup>5</sup> The petition then states by whom it is presented, and the particulars of the case, and concludes by praying the court to make the order required.<sup>6</sup> A petition for payment from a fund in court need not be as precise in its statements as a bill.<sup>7</sup> Brevity and form are chiefly to be observed in drawing petitions; and care must be taken to avoid scandal and impertinence, for which a petition, except it be for a rehearing,<sup>8</sup> may be referred as well as any other proceeding.<sup>9</sup> Petitions are usually signed by the party or by

not be compelled to answer, but which he may resist in many ways to the delay of justice if not to its defeat; and should he volunteer to answer, his answer may be as evasive and misleading as human ingenuity can devise.” *Trotter v. Heckscher*, 41 N. J. Eq. 478, 481.

<sup>1</sup> *Receiver &c. v. First Nat. Bank*, 34 N. J. Eq. 451.

<sup>2</sup> *In Shaft v. Phoenix Mut. L. Ins. Co.*, 67 N. Y. 544, 547, 548.

<sup>3</sup> See *Anon.*, *Hopk. Ch.* 101.

<sup>4</sup> 3 *Daniell's Ch. Pr.* (1st ed.) 265,

*n. h.*; 2 *Barbour's Ch. Pr.* (2d ed.) 580.

<sup>5</sup> 3 *Daniell's Ch. Pr.* (1st ed.) 265, *n. h.*; 2 *Barbour's Ch. Pr.* (2d ed.) 580.

<sup>6</sup> 2 *Barbour's Ch. Pr.* (2d ed.) 580. If the applicant is not a party he should state his residence and description. *Glazbrook v. Gillatt*, 9 *Beav.* 492.

<sup>7</sup> *Weaver v. Cooper*, 73 *Ala.* 318.

<sup>8</sup> *Rowe v. Wood*, 1 *J. & W.* 326, *n.*

<sup>9</sup> 3 *Daniell's Ch. Pr.* (1st ed.) 266; 2 *Barbour's Ch. Pr.* (2d ed.) 580.

his solicitor,<sup>1</sup> but the signature of counsel is not necessary except to petitions of appeal or for a rehearing.<sup>2</sup>

§ 569. Notice of petitions.—All petitions except those which are of course require service upon all parties interested.<sup>3</sup> The English orders in chancery require service to be made two clear days, of which Sunday is not one, before the hearing.<sup>4</sup> The federal equity rules require “reasonable” notice to the adverse party,<sup>5</sup> which is served in substantially the same manner as notices of motions.<sup>6</sup> Where actual service is required it is effected by delivering to the person served a true copy of the petition, and at the same time showing him the original.<sup>7</sup> Where a petition is served upon an infant or a person of unsound mind a guardian *ad litem* must be appointed by whom he may appear.<sup>8</sup>

§ 570. Hearing of petitions.—If upon the hearing the petitioner does not appear, the petition will be dismissed with costs, upon the production of a copy of the petition and affidavit of due service by the person upon whom it was served.<sup>9</sup> The general practice upon the hearing of petitions is nearly the same as that upon motions.<sup>10</sup> On the other hand, if the petitioner appears, and no one appears in opposition to the petition, an order conformable to the prayer thereof will be made on producing an affidavit of service upon all the parties inter-

<sup>1</sup> 2 Daniell's Ch. Pr. (2d Am. ed.) 1808.

<sup>2</sup> Hathaway v. Scott, 11 Paige, 178.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1607. See, also, Crane v. Brigham, 11 N. J. Eq. 29. It was held in Weaver v. Cooper, 78 Ala. 318, that notice of a petition for payment from a fund in court will be dispensed with if the parties interested appear and answer to it.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1606, 1607.

<sup>5</sup> Equity Rule 8.

<sup>6</sup> See § 559, *supra*. Whoever is served with a petition is considered entitled to costs of appearing whether he is interested in the matter or not. 3

Daniell's Ch. Pr. (1st ed.) 269; Barbour's Ch. Pr. (2d ed.) 581; Garey v. Whittingham, Turn. & Russ. 405, notes; Templeman v. Warrington, 1 J. & W. 377, n.; Heneage v. Aikin, 1 J. & W. 377.

<sup>7</sup> 2 Daniell's Ch. Pr. (5th ed.) 1607. As to substituted service see §§ 177 *et seq.*; 559, *supra*; 579, n. 6, *infra*.

<sup>8</sup> 2 Daniell's Ch. Pr. (5th ed.) 1607, citing *Re Barrington*, 27 Beav. 272; *Re Ward*, 2 Giff. 122; *Re Duke of Cleveland's Harte Estate*, 1 Dr. & Sm. 46; *Re Greaves*, W. R. 353.

<sup>9</sup> 3 Daniell's Ch. Pr. (1st ed.) 268, 269; 2 Barbour's Ch. Pr. (2d ed.) 581.

<sup>10</sup> 3 Daniell's Ch. Pr. (1st ed.) 268.

ested, provided the case justifies the order.<sup>1</sup> Adverse parties may file answers in denial or avoidance of facts stated in the petition, which answers should be verified by affidavit.<sup>2</sup> By answering the defendant waives all objections to the form and mode of proceeding; such objections should be taken by demurrer.<sup>3</sup> The rule with regard to reading affidavits and the general practice as to evidence which may be used upon the hearing of petitions are substantially the same as those with regard to motions.<sup>4</sup>

**§ 571. Petitions of intervention—General right to intervene.**—“Intervention is the generic designation in the civil law of the various technical processes by which, when a suit is pending between two parties, a third party is allowed to interpose for the assertion of some collateral, implicit or ulterior right, adverse to that of either or both of the others, or to defend a responsibility involved in the issue of the controversy.”<sup>5</sup> “No one, even in equity, is entitled to be made or to become a party to the suit unless he has an interest in its object; yet it is the common practice of the court to permit strangers to the litigation, claiming an interest in its subject-matter, to intervene on their own behalf to assert their title.”<sup>6</sup> “The United States would generally be allowed to

<sup>1</sup> 8 Daniell's Ch. Pr. (1st ed.) 269; 2 Barbour's Ch. Pr. (2d ed.) 580, 581. See *Bound v. South Carolina Ry. Co.*, 46 Fed. Rep. 815.

<sup>2</sup> 1 Foster's Federal Practice (2d ed.), § 202; Mitford & Tyler's Pl. 448. “If the petition presents an issue of fact, the opposite party may plead to it, or he may answer it as though it were a bill; and if it presents an issue of law he may demur to it, although the common practice is to move to dismiss it.” Gibson's Suits in Chancery, § 778. In New Jersey, where a petition is presented and an adverse party has a right to be heard in opposition, the usual proceeding is to take a rule or order fixing a day for the hearing. Copies of the petition and order are served on the opposite party, and the parties are heard upon

affidavits. The petition itself is no evidence of the facts stated in it. They must all be proved *aliunde*. No answer to the petition is required. *Crane v. Brigham* (1855), 11 N. J. Eq. 29; *Coxe v. Halstead*, 2 N. J. Eq. 811; *State Bank v. Bell*, 7 N. J. Eq. 372, 376. See § 566, n. 8, *supra*.

<sup>3</sup> *Newman v. Moody*, 19 Fed. Rep. 858.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1608. *In re Westbrook's Trusts*, L. R. 11 Eq. 252, holds that a petition may be amended by adding supplemental matter occurring after it was filed.

<sup>5</sup> Per Caleb Cushing, *arguendo*, *Florida v. Georgia*, 17 How. 478.

<sup>6</sup> *Krippendorf v. Hyde*, 110 U. S. 276. In that case it was held that where property of the wrong person is attached on process issued by the

intervene summarily, or by a supplemental information or bill, for protecting property rights involved in a pending suit in equity.”<sup>1</sup>

Supreme Court he may intervene in the suit for the protection of his rights, by petition *pro interesse suo*; or by a more formal but dependent bill in equity, if necessary, or in a summary way by motion merely supported by affidavits; or if proceedings authorized by the statutes of the State in which the cause is pending afford an adequate remedy, by adopting them as part of the practice of the court; also that he may appeal from a final decree against him, and want of diverse citizenship is no objection to his application to intervene. *Everett v. Edwards*, 149 Mass. 588; *Robertson v. Baker*, 11 Fla. 192, 231; *Barner v. Bayless* (Ind.), 38 N. E. Rep. 907; *Clough v. Thomas*, 53 Ind. 24; *Mahr v. Society*, 127 N. Y. 461. After a decree and sale in proceedings to enforce a trust deed, and while the purchase-money was still undistributed, a party having rights in the property prior to the complainants was permitted to intervene and have them adjusted and obtain proper relief. *French v. Gapen*, 105 U. S. 509. “In a suit *in rem* where a court has jurisdiction of the *res* and its decree affects the interest in the *res* of all persons who have an interest in the *res*, a person who has a lien or claim upon or other interest in the *res* is allowed to intervene and be heard for his own interest. The theory of this is that the person by his interest in the *res* has an interest in a legal sense in the subject-matter of the controversy. But in a suit *in personam* a person not a party to the suit can have no interest in a legal sense in a personal claim made in the suit against a defendant therein unless it is necessary that such person, not a party, should be made a

party in order properly to enforce such claim.” Per Blatchford, J., in *Coleman v. Martin*, 6 Blatchf. 119, 120. In *Billings v. Aspen Mining & Smelting Co.*, 51 Fed. Rep. 838, it was held to be error to refuse a petition to become a party complainant in order that a decree might be made which should settle the rights of all the parties. A judgment creditor who has levied on property of his debtor after it has come into possession of a receiver appointed under a foreclosure suit, which, the creditor alleges, was collusively brought in order to defeat his recovery, may, on disclaiming any intention to interfere with the possession of the receiver, be permitted to intervene in the foreclosure suit. *Farmers' L. & T. Co. v. Toledo &c. R. Co.*, 43 Fed. Rep. 228.

<sup>1</sup> Putnam, C. J., in *Potter v. Beal*, 50 Fed. Rep. 860,—“in accordance with the broad principles of *Florida v. Georgia*, 17 How. 478.” But in the case first cited it was the opinion of the court that where a United States district attorney sought to reach for user in criminal proceedings certain papers impounded by the court, he ought to procure a proper subpoena *duces tecum* before making a summary application. His petition to be admitted was dismissed without costs and without prejudice. Where an administrator, party to a foreclosure suit for sale of the land of his intestate, after request by the creditors, refuses to apply to have the sale set aside, a creditor, on behalf of himself and other creditors, may obtain relief on petition. He may be permitted to intervene in the name of the administrator, on such terms as the court may see fit to impose for the indemnity of the latter, or, if

§ 572. **Intervention by strangers.**—Where a stranger to a suit seeks to appropriate moneys paid into court by a party to the cause, he must do so by bill and not by petition.<sup>1</sup> In Massachusetts the rule was stated to be that persons who hold assignments of the interests of parties in a fund in court or liens upon it may appear in equity as claimants, but a judgment creditor without a specific lien cannot intervene and appropriate it to the payment of his debt.<sup>2</sup> Where execution has issued in a suit in equity and a levy and sale of certain lands have been made, a third party claiming title cannot intervene for the purpose of moving to set aside the execution when there is no privity of estate between him and the party against whom the execution has issued.<sup>3</sup> The purchaser of a railroad in the hands of a receiver may properly be refused leave to intervene as a complainant and reopen litigation conducted by the receiver.<sup>4</sup> So may one be refused permission to become a party to the proceedings at a late stage thereof, his position being no better than that of the parties in the

occasion require, in his own name. *Van Dyke v. Van Dyke*, 81 N. J. Eq. 176, citing *Drew v. Harman*, 5 Price, 819; *Receiver &c. v. Wortendyke*, 27 N. J. Eq. 658; *Houlditch v. Marquis of Donegal*, 1 Sim. & Stu. 491; *Williamson v. N. J. Southern R. Co.*, 25 N. J. Eq. 18. The subject of intervention is treated at considerable length in 17 Am. & Eng. Encyc. of Law, 688, citing statutory provisions in many States and decisions thereunder.

<sup>1</sup> *Esterbrook Co. v. Ahern*, 81 N. J. Eq. 4, on the principle applied in *Linn v. Wheeler*, 21 N. J. Eq. 281, that no one not a party can make a motion except for the purpose of being made a party.

<sup>2</sup> *Tuck v. Manning*, 150 Mass. 211, where Field, J., said:—“To admit them would be to interfere with the final determination of causes, and would convert suits in which money has been deposited in court into proceedings for the benefit of creditors

of one or more of the parties.” By the course of legislation and practice in Massachusetts, “other parties standing in like relation to the suit, such as executors, administrators, etc., are permitted to intervene by a petition, which is thus made a substitute for a bill of revivor.” *Murray v. Dehon*, 102 Mass. 11, 18; *Pingree v. Coffin*, 12 Gray, 288. Likewise a new trustee may appear by petition and prosecute a bill filed by his predecessor. *Murray v. Dehon*, *supra*.

<sup>3</sup> His remedy is a bill to quiet title, or he may in an action at law plead the invalidity of the execution. *Ex parte Mensing*, 55 Fed. Rep. 17; *s. c. sub nom. Claffin v. South Carolina R. Co.*, 55 Fed. Rep. 17. See, also, *Thomson-Houston Electric Co. v. Sperry Electric Co.*, 46 Fed. Rep. 75.

<sup>4</sup> *Ritchie v. Cincinnati &c. Ry. Co.* (Ky.), 21 S. W. Rep. 641. See, also, *Fairbanks v. Farwell* (Ill.), 80 N. E. Rep. 1056.

case, and no offer being made by him to become responsible for the delay.<sup>1</sup>

§ 573. **The same subject continued.**—One who has an interest in the suit but no interest in the event, and is in no direct privity with the person sued, will not be permitted to intervene and defend.<sup>2</sup> Where a bill is filed against an executor to establish a claim against the estate, although the residuary legatee is not a necessary party, yet if he has a direct interest in the event of the suit, and the executor is disqualified by his relationship to the complainant from representing and protecting the rights of the legatee, the latter may be admitted on petition to defend the bill in person, and this without regard to the good or bad faith of the executor; if the bill seeks no answer from or decree against the legatee it need not be amended to make him formally a party defendant.<sup>3</sup> In a suit against a railroad company to restrain it from infringement of a patent upon oil cars, the defendant disclaimed ownership of the cars and of any interest in the patent, and insisted that its sole offense was in transporting the cars as a common carrier. It was held that the owner of the cars was entitled to intervene and defend the suit, setting up its rights.<sup>4</sup>

<sup>1</sup>Central Trust Co. v. Texas &c. Ry. Co., 24 Fed. Rep. 153. A purchaser of a judgment during the pendency of a foreclosure suit from a defendant in the suit is not entitled to come in by petition and be made a party to the suit. He must file a bill for that purpose. Loomis v. Stuyvesant, 10 Paige, 490. A party who was permitted to intervene in a cause and afterwards lost all his interest in the subject-matter of the suit has no standing on a petition to open the decree. Ward v. Montclair Ry. Co., 26 N. J. Eq. 260. Where a party becomes bankrupt during the progress of a cause, it is for the assignee to determine whether he will apply to be permitted to intervene, and if he does not do so he is bound by the result of the suit. Esterbrook

Co. v. Ahern, 31 N. J. Eq. 3, 7. See, also, *Ex parte* Railroad Co., 95 U. S. 221; Eyster v. Gaff, 91 U. S. 521.

<sup>2</sup>Thomson-Houston El. Co. v. Sperry El. Co., 46 Fed. Rep. 75. See, also, *Ex parte* Mensing, 55 Fed. Rep. 17; Coffin v. Chattanooga Water & Power Co., 44 Fed. Rep. 543.

<sup>3</sup>Melick v. Melick, 17 N. J. Eq. 156, distinguished in Jones v. Winans, 20 N. J. Eq. 96, where a petition to be made a defendant by one who was neither a necessary nor a proper party was denied.

<sup>4</sup>Standard Oil Co. v. Southern Pac. R. Co., 54 Fed. Rep. 521, holding it immaterial that the petition was entitled "Petition for interpleader." See, also, Bronson v. La Crosse R. Co., 2 Wall. 288.



§ 574. **Intervention by beneficiaries.**—Persons belonging to a class represented in the suit, such as mortgage creditors represented by the trustees of the mortgage, are regarded as *quasi*-parties, and may be heard on petition or motion.<sup>1</sup> In suits brought by a trustee or otherwise affecting trust property, the beneficiaries of the trust will frequently be allowed to intervene for the purpose of protecting their interests.<sup>2</sup> But “the rule is now well established that the individual bondholder and the separate beneficiary will not be made parties to suits relating to the mortgage or trust deed unless it is alleged and shown that the trustee is incompetent or for some reason cannot faithfully represent the *cestui que trust*.”<sup>3</sup>

§ 575. **Intervention by stockholders as defendants in the federal courts.**—Where a corporation is a defendant and upon a petition to intervene alleging “that the directors refused to attend to the interests of the corporation, the court will in its discretion allow a stockholder to become a party defendant for the purpose of protecting from unfounded and illegal claims against the company his own interest and the interest of such other stockholders as may choose to join him in the defense.”<sup>4</sup>

<sup>1</sup> *Anderson v. Railroad Co.*, 2 Woods, 628; *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 58 Fed. Rep. 850.

<sup>2</sup> *Carter v. City of New Orleans*, 19 Fed. Rep. 659; *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 58 Fed. Rep. 850.

<sup>3</sup> Per Goff, Circuit Judge, in *Clyde v. Richmond &c. R. Co.*, 55 Fed. Rep. 445, citing the following cases:—*Skiddy v. Railroad Co.*, 8 Hughes, 320; *Wetmore v. Railroad Co.*, 1 McCrary, 466; s. c., 8 Fed. Rep. 177; *Railroad Co. v. Howard*, 7 Wall. 392; *Richter v. Jerome*, 128 U. S. 238; *Shaw v. Railroad Co.*, 5 Gray, 162; *Farmers' L. & T. Co. v. Kansas City &c. R. Co.*, 58 Fed. Rep. 182; *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Kerrison v. Stewart*, 93 U. S. 155;

*Richards v. Railroad Co.*, 1 Hughes, 28.

<sup>4</sup> Per Justice Nelson in *Bronson v. Railroad Co.*, 2 Wall. 283. See, also, *Ex parte Jordan*, 94 U. S. 248, 249. In the application of this doctrine it was held in *Central Trust Co. v. Marietta &c. R. Co.*, 48 Fed. Rep. 14, that the circumstances would not justify an intervention. See, also, *Blackman v. Railroad Co.*, 58 Ga. 189; *Bayliss v. Lafayette &c. Ry. Co.*, 8 Biss. 193. The doctrine declared in *Bronson v. Railroad Co.*, 2 Wall. 283 (*supra*), is pronounced unsound in *Ex parte Printup*, 87 Ala. 148. In *Forbes v. Railroad Co.*, 2 Woods, 323, Justice Bradley used the following language:—“A suggestion in the progress of the suit that an officer of the court is disposed to act



**§ 576. Intervention on a creditor's bill.**— The practice of permitting judgment creditors to come in and make themselves parties to a creditor's bill, and thereby obtain the benefit of the suit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled.<sup>1</sup> Where a bill is filed by judgment creditors in behalf of all judgment creditors to reach property which could not be effectively reached at law, and no order is made requiring others to intervene by a certain time or be barred of their rights, all judgment creditors who choose to intervene, even though not until after an interlocutory decree ordering a sale, are entitled to share ratably with the complainants in the proceedings.<sup>2</sup>

fraudulently, or that the court has made an injudicious or erroneous order, will not be sufficient ground to allow such a party to intervene. Indeed, it is questionable whether in any case, where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as party to that suit, and seek to defend or control the proceedings. An original bill would rather seem to be a proper mode of proceeding." In that case an order granting leave to intervene was afterwards vacated as improvidently made.

<sup>1</sup>Libby v. Norris, 142 Mass. 246, exemplifying the practice on creditor's bills; Myers v. Fenn, 5 Wall. 205, where it was held that proceedings of this kind will not be reversed, where they have been conducted to conclusion without a formal order granting permission to the party so coming in, and no objection is made for want of such order. But regularly an order of court is necessary, and merely depositing a petition in the clerk's office in vacation is not sufficient. Walter v. Chichester, 84 Va. 728; Insurance Co. v. Maury, 75 Va. 508. As to the absolute right of

parties interested in a common fund brought into court at the suit of the other parties to intervene for a distributive share, see, also, Belmont Nail Co. v. Columbia Iron & Steel Co., 46 Fed. Rep. 836; Martin v. Rainwater, 56 Fed. Rep. 7; Forbes v. Railroad Co., 2 Woods, 384; *In re* Howard, 9 Wall. 175; Campbell v. Railroad Co., 1 Woods, 368; Williams v. Gibbs, 17 How. 289; Johnson v. Waters, 111 U. S. 640; Flash v. Wilkerson, 22 Fed. Rep. 689; Kimberling v. Hartley, 1 McCrary, 186; s. c., 1 Fed. Rep. 571; Phillips v. Blatchford, 26 Ill. App. 606. In Maryland and in Illinois a creditor may come in either by petition or by filing the vouchers of his claims. Strike v. McDonald, 2 Harr. & Gill, 191; Derrick v. Lamar Ins. Co., 74 Ill. 404, 407. The doctrine is equally well settled, subject to a few exceptions, that the holder of an unliquidated demand cannot intervene until it is reduced to judgment. George v. St. Louis &c. Ry. Co., 44 Fed. Rep. 117; Martin v. Michael, 28 Mo. 50; Dunlevy v. Tallmadge, 32 N. Y. 459; Turner v. Adams, 46 Mo. 95; Webster v. Clark, 25 Me. 814; Dodd v. Levy, 10 Mo. App. 122.

<sup>2</sup>George v. St. Louis &c. Ry. Co., 44 Fed. Rep. 117, distinguishing

**§ 577. The same subject continued.**— A creditor who delays asking to be admitted as a co-complainant until after the case has been finally heard should be admitted, unless his admission is by consent, only on condition that those who have expended their labor and incurred the risk of trying the case be first paid.<sup>1</sup>

**§ 578. Intervention as a defendant.**— A person not a party to the suit, whatever may be his claim on the property involved, cannot intervene by petition and be made a defendant, against the objection of the complainant, for the purpose of defeating his entire suit and reaping the proceeds of property brought into court by a bill, after its dismissal on his defense.<sup>2</sup>

*Trust Co. v. Earle*, 110 U. S. 710, and holding also that it does not affect the right of such subsequent intervenors to share ratably that the bill prays that after a sale the proceeds may be distributed among the persons in whose behalf the suit is brought "according to their respective rights and equities," where the original complainants and prior intervenors had no prior lien on all the property sold when the bill was filed. *Johnston v. Markle Paper Co.* (Vt.), 25 Atl. Rep. 885.

<sup>1</sup> *Jones v. Davenport*, 45 N. J. Eq. 77, 87. Chancellor Bland held, in *Strike's Case*, 1 Bland, 57, that it was the right of any creditor of the defendant to be admitted as a co-complainant either before or after final decree; in fact at any time before the property was distributed. See, also, *Wilder v. Keeler*, 8 Paige, 164. In *Smith v. Craft*, 11 Biss. 840, Judge Gresham held that if a creditor asked permission after the court had announced its decision, he should only be admitted on condition that the payment of his claim was postponed to that of the complainant. Chancellor Kent held that a creditor who by superior diligence had acquired a

judicial preference was entitled to have that preference preserved to him when the assets were distributed. *McDermutt v. Strong*, 4 Johns. Ch. 687. And Chancellor Walworth, in *Edmeston v. Lyde*, 1 Paige, 689, said that it did not seem just that a creditor who had sustained all the risk and expense of bringing his suit to a successful termination should be compelled to divide the fruits of his efforts with those who intentionally kept back until there was no risk in becoming parties to the suit.

<sup>2</sup> *Renfro v. Goetter*, 78 Ala. 811, 818, 814. where the court said:—"Generally a complainant may elect whom he will make parties and with whom he will litigate, under the rules governing proper and necessary parties. Whenever during the progress of the cause it is disclosed or made known that an absent person is a necessary party in order that an effective decree may be rendered, or that a decree cannot be rendered without affecting such person's rights, it is competent for the court to order that the complainant amend so as to make him a party, and, on failure or refusal, to dismiss his bill; but the court cannot make him a

**§ 579. Requisites of a petition to intervene.**— A petition of intervention should disclose upon its face the nature of the suit in which it is filed and the grounds upon which

party without action taken by the complainant. When a person not a party to a pending suit, between whom and the complainant there is no privity, but who has a claim or lien on the property—a new and independent claim,—or is interested in the subject-matter of the suit, desires for his own protection to present his new claim, to assert his independent rights and raise new issues, he must do so by a formal bill containing proper allegations—an original bill in the nature of a cross-bill or of a supplemental bill, as the case may authorize. *Cowles v. Andrews*, 39 Ala. 125; *Caron v. Mowatt*, 1 Edw. Ch. 9; *Anderson v. Jacksonville &c. R. Co.*, 2 Woods, 628; *Stretch v. Stretch*, 2 Tenn. Ch. 140. In *Ex parte Printup*, 87 Ala. 148; s. c., 6 So. Rep. 418, the rule is again declared that a motion to be admitted as a defendant in a suit is irregular, and that in equity jurisprudence there is no such practice as making a person a defendant upon his own application and over the objection of the complainant. The court said that “upon this general rule two exceptions have been engrafted. One of these, growing out of trust relations between a party and third persons, is thus formulated by Judge Story:— ‘If the *cestuis que trust* (or beneficiaries) should not be made parties to the suit, and their interests are apparent, a court of equity will sometimes, as a matter of indulgence, and to prevent further delay and expense, allow them (if they wish) to bring forward their claims by petition, in order to have their interests ascertained and their rights protected.’ Story’s Equity Pleading, § 208; *Drew*

*v. Harman*, 5 Price, 319. The other exception is illustrated in those cases where the petitioner desires to intervene only for the purpose of proper administration and distribution of a fund which is in the custody or control of the court and in which he, though not a party, is entitled to rights. *Carlin v. Jones*, 55 Ala. 680.” The court disapproved *Bronson v. La Crosse R. Co.*, 2 Wall. 288, as a case “opposed to all other adjudications on the point.” In *Stretch v. Stretch*, 2 Tenn. Ch. 140, 142, the question received characteristic treatment by Chancellor Cooper, who delights in vindicating orthodox doctrines. After quoting the passage from Judge Story (*supra*), he said:— “The reason of this exception is about this: that the trustee represents the beneficiaries as between them and the opposing party, and if the trust distinctly appears of record there can be little objection to the summary remedy by petition as between the trustee and his *cestui que trust*. But even in this extreme case the remedy by petition is ‘a matter of indulgence,’ not of right, and the remedy by original bill in the nature of a cross-bill clear and beyond question. Story’s Eq. Pl., § 208. It was upon this exception, however, and the authority of Judge Story in the section cited, that our Supreme Court made the ruling in *Birdsong v. Birdsong*, 2 Head, 289, 302, although the same point had been ruled otherwise in *Morris v. Nixon*, 7 Humph. 584. The case of *Saylors v. Saylors*, 3 Heisk. 583, is similar to and based upon *Birdsong v. Birdsong*. There are cases in the books where the courts have gone

the party seeks to intervene.<sup>1</sup> The court will not consider questions argued but not founded on matter set forth in the petition.<sup>2</sup> A petition styled a cross-bill, or a "petition in the nature of a cross-bill," may be treated as a petition of intervention if it is otherwise in conformity therewith,<sup>3</sup> but not

further, and upon the petition of a stranger permitted him to intervene as a defendant, *no objection* having been made by the complainant. Such were the cases of *Galveston R. Co. v. Cowdrey*, 11 Wall. 459, 464; *Banks v. Banks*, 2 Cold. (Tenn.) 546, 548; *Wilson v. Eifler*, 7 Cold. (Tenn.) 88. Such, also, was the case of *Hill v. Bowers*, 4 Heisk. 273; for although the printed opinion states that the stranger was permitted to intervene 'without objection by the defendant,' yet, as there were several defendants and only one complainant, and as the word 'defendant' occurs in the next preceding line, and as there would be no point in the defendant objecting, it seems almost certain that the word 'defendant' as printed is a misprint for the word 'complainant.' In *Read v. Long*, 4 Yerg. 71, parties were made defendants over the objection of the complainant, and the question was not passed upon by the Supreme Court. . . . I have myself, in two or three instances, upon principle and authority, ruled against the right to intervene in this mode, and upon reconsideration see no reason to doubt the correctness of my ruling. No such practice is known in equity as making a person a defendant to a suit on his own application. See *Coleman v. Martin*, 6 Blatchf. 119; *Shields v. Barrow*, 17 How. 145; *Drake v. Goodridge*, 6 Blatchf. 151." In *French v. Gapen*, 105 U. S. 509, 525, Waite, C. J., alludes to the power of the court, "with the consent of the complainants," to admit an intervenor as a defendant. See, also,

in support of the text, *Lincoln v. New Orleans Exp. Co. (La.)*, 12 So. Rep. 637; *Carroll v. Bridewell*, 27 La. Ann. 239; *Fleming v. Shields*, 31 La. Ann. 118; *Lee v. Bradice*, 8 Martin (La.), 55; *Postal Tel. Cable Co. v. Snowden*, 68 Md. 118.

<sup>1</sup> *Ransom v. Davis' Adm'rs*, 18 How. 295. For a form of a prayer for relief on a petition of intervention, see *French v. Gapen*, 105 U. S. 509, 519. A party who, having acquired an interest during the pendency of the suit, applies under the New Jersey chancery act to be made a party in order to move to open the decree, must present in his petition a case of substantial equity. Claiming in the court below the right to be let in as a party for a specified purpose, he cannot object on appeal to the order refusing his admission that he had the right to be joined to the suit for another purpose. *Davis v. Sullivan*, 33 N. J. Eq. 569; *Guest v. Hewitt*, 27 N. J. Eq. 479, which holds that a party who has acquired an interest in a cause after its inception and comes in by petition under the chancery act, which provides that he shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired, is no further bound by previous orders and decrees than the party whose place he has taken, and is entitled to the same equitable consideration on motion to have a decree set aside or opened.

<sup>2</sup> *Clyde v. Richmond & C. R. Co.*, 55 Fed. Rep. 445.

<sup>3</sup> *French v. Gapen*, 105 U. S. 509,

where it introduces new and distinct matters not within the scope of the original bill.<sup>1</sup> An objection that certain persons were allowed to become parties to a creditor's bill on imperfect petitions cannot be made after answer and submission for trial on the merits.<sup>2</sup> Where individual stockholders or bondholders desire to intervene in suits conducted or defended by parties charged with their interests, they should proceed with due diligence, and a petition filed at a late stage of the case may properly be dismissed on the mere ground of delay.<sup>3</sup> If no exception be taken to a petition to intervene as a defendant, the intervenor may be treated as if he had originally been made a defendant.<sup>4</sup> The omission of a formal order granting leave to intervene is no objection where the subsequent proceedings were carried on with the acquiescence of all parties as if such an order had been entered.<sup>5</sup> Where the beneficiaries of a trust intervene in a suit by the trustee affecting the trust property, service by substitution may be had by leave of the court upon the attorney for the complainant when the latter is beyond the jurisdiction of the court.<sup>6</sup> An intervention by a stranger to the suit is treated as a dependent proceeding so far as to obviate an objection on the ground of want of diverse citizenship of the intervenor.<sup>7</sup> The dismissal of an intervention "without prejudice" means no more than that the intervenor may institute another suit to enforce his alleged rights, and, at best, may perhaps intervene again in the same cause of action in the same case.<sup>8</sup> An intervenor

519; *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. Rep. 850, 852.

<sup>1</sup> *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. Rep. 850, 852.

<sup>2</sup> *Gibson v. Trowbridge Furniture Co. (Ala.)*, 11 So. Rep. 865.

<sup>3</sup> *Central Trust Co. v. Texas &c. Ry. Co.*, 24 Fed. Rep. 158. See, also, *Hawes v. Oakland*, 104 U. S. 450.

<sup>4</sup> *French v. Gapen*, 105 U. S. 509, 525.

<sup>5</sup> *Myers v. Fenn*, 5 Wall. 205. In *Ex parte Jordan*, 94 U. S. 248, 249, appears the form of an order grant-

ing leave to intervene as a defendant.

<sup>6</sup> *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. Rep. 850, holding, however, that such service cannot be had on a "petition in the nature of cross-bill" setting up new matter as a basis for affirmative relief; *Lowenstein v. Glidewell*, 5 Dill. 325; *Rubber Co. v. Goodyear*, 9 Wall. 807; *Bowen v. Christian*, 16 Fed. Rep. 730.

<sup>7</sup> *Krippendorf v. Hyde*, 110 U. S. 276, 283, 284. See, also, *Clark v. Mathewson*, 12 Peters, 164, 172.

<sup>8</sup> *Easton v. Houston &c. Ry. Co.*, 44

has the right to appeal from a final decree and on that appeal contest the validity of interlocutory orders made subsequent to his admission as a party and affecting his interest in the litigation.<sup>1</sup>

§ 580. When an intervention becomes effective.—The mere filing of a petition to be made a party in a pending suit does not operate to make the petitioner a party.<sup>2</sup> Where a person applies to be made a party, and an order is made that the cause stand over, with liberty to the complainant to amend his bill by adding proper parties if he should be so advised, such order does not make the applicant a party to the bill, nor create a *lis pendens*, as to him, prior to his being made a party.<sup>3</sup> “There are cases in which persons have been treated as parties to a suit after having filed a petition for leave to come in, when no formal order admitting them appeared in the record; but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings.”<sup>4</sup>

§ 581. Consolidation of causes (a)—In the federal courts.—The United States Revised Statutes provide that “When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules con-

Fed. Rep. 7, 9, holding that such a dismissal is a final decree within United States Equity Rule 88, providing for rehearings. See, also, *Gumbel v. Pitkin*, 118 U. S. 545; s. c., 5 S. Ct. Rep. 616.

<sup>1</sup> *Ex parte Jordan*, 94 U. S. 248, 252. A bondholder has such an interest in the amount allowed as compensation to the trustee that he may appeal from an adverse decision thereon. *Williams v. Morgan*, 111 U. S. 684. As to the right of an intervenor to remove a case from a State to a federal court, see *Hack v. Chicago &c. Ry. Co.*, 28 Fed. Rep. 856; *Iowa Homestead Co. v. Des Moines &c. R. Co.*, 8 Fed. Rep. 97.

<sup>2</sup> *In re Doyle*, 14 R. L. 55; *Walter*

*v. Chichester*, 84 Va. 728; s. c., 6 S. E. Rep. 1; *Piedmont &c. Ins. Co. v. Maury*, 75 Va. 508, holding that the complainant in a creditor's bill had a right to dismiss his bill before decree without the consent of other creditors who had simply filed petitions to be admitted as parties.

<sup>3</sup> *Bigelow v. Stringfellow*, 25 Fla. 866; s. c., 5 So. Rep. 816.

<sup>4</sup> *Ex parte Cutting*, 94 U. S. 14, citing *Myers v. Fenn*, 5 Wall. 205; *Harrison v. Nixon*, 9 Pet. 491; *Ogilvie v. Ins. Co.*, 2 Black, 589; *Bronson v. Railroad Co.*, 2 Wall. 804; *Railroad v. Bradleys*, 7 Wall. 575; *Umbarger v. Watts*, 25 Gratt. 167; *Piedmont &c. Ins. Co. v. Maury*, 75 Va. 508.



cerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.”<sup>1</sup> It seems that under this statute consolidation can be ordered on motion of the defendant.<sup>2</sup> A motion to consolidate three foreclosure suits, where neither was ripe for decree and nothing could be gained for the purpose of a hearing, was denied, with leave to renew the same when either case should be ripe for decree.<sup>3</sup>

§ 582. (b) In West Virginia, Georgia and Indiana.—In West Virginia the rule is declared to be “that the consolidation of actions is not a matter of right, nor is it a proper subject of any pleading either in bar or in abatement. It depends on the circumstances of the case, and is addressed to the discretion of the court; and the only proper mode of bringing it to the view of the court is by a motion for a rule to show cause why the actions should not be consolidated.”<sup>4</sup> Where the parties are the same and separate suits have been brought in equity upon matters which have been united in one suit, and the defense is the same in all, a consolidation rule ought to be granted; but where the suits are by different complainants proceeding against different funds of the defendant to satisfy separate and distinct liens, and one of the suits has proceeded to a decree confirming the report of a master before the other is instituted, the court will deny an order for consolidation.<sup>5</sup> In Georgia, where three suits were proceeding in favor of different parties on the same claim, two of them being for the whole claim and the third for a large part thereof, against the same defendant, and the trial of each case would require an investigation into long and complicated accounts involving a large amount, they

<sup>1</sup> U. S. R. S., § 921.

<sup>2</sup> *Summerlin v. Fronteriza & Co. Mining Co.*, 41 Fed. Rep. 249, 255.

<sup>3</sup> *Mercantile Trust Co. v. Missouri, K. & T. R’y Co.*, 41 Fed. Rep. 8. In *Central Trust Co. v. Virginia Steel & Iron Co.*, 55 Fed. Rep. 769, where interests of distinct corporations were

involved and the complainants in some of the suits were defendants in others, consolidation was denied.

<sup>4</sup> *Beach v. Woodyard*, 5 West Va. 231; *McRae v. Boast*, 8 Rand. (Va.) 481.

<sup>5</sup> *Beach v. Woodyard*, 5 West Va. 231.



were consolidated and disposed of by one decree.<sup>1</sup> In Indiana, where two suits by different complainants against the same defendant, asking for an account and the appointment of a receiver, were consolidated, the rights of the plaintiffs were regarded as separate and distinct, and independent proof was required of each claim.<sup>2</sup>

§ 583. (c) In Wisconsin.—It was held in a recent case in Wisconsin that where two of three heirs having each brought actions to charge the representative of the administrator of the estate of their ancestor, and one who had been the business partner of the administrator, separately with the profits arising from their dealings with the lands of the ancestor, and where each cause of action arose out of the same transactions, and the rights of all parties could be fully protected in a single action, the court might properly order all four actions to be consolidated, and on motion of the third heir make him a party to the consolidated action.<sup>3</sup>

<sup>1</sup> Wilson v. Riddle, 48 Ga. 609.

<sup>2</sup> Midland Ry. Co. v. Island Coal Co., 126 Ind. 884. See Grant v. Davis (Ind.), 81 N. E. Rep. 587.

<sup>3</sup> Biron v. Edwards (1890), 77 Wis. 477. "The question," said Judge Lyon, in the case cited, "is purely one of practice. By what procedure shall the whole controversy be concentrated in one action? This might have been accomplished by bringing in all the heirs and both defendants in one of the actions, and dismissing the other three. . . . Again, instead of dismissing three of the actions, the court might have stayed proceedings therein during the pendency of the other action. We perceive no valid objection to this practice had it been adopted. But instead of pursuing either course suggested the court formally consolidated the four actions into one action, provided for pleadings *de novo* in that action, and in the exercise of its discretion made what seems to be an equitable provision as to the costs

of the actions thus consolidated. If it be conceded that the practice adopted is not technically regular, we do not understand how the appellants could possibly be injured by it, or what advantage would have accrued to them had the court, instead of consolidating the actions, stayed proceedings in or dismissed three of them. If the appellants are not injured by the alleged irregular practice (and we think they are not), it is no ground for reversal of the order of consolidation. But we do not think that the order of consolidation is irregular. We cannot doubt that the power inheres in a court of equity, in its discretion, to consolidate causes pending therein for the purpose of avoiding a multiplicity of suits and trials where the consolidation can work no injury to any party. This power is essential to the proper administration of justice, and does not depend upon any statute for its existence. . . . There is some apparent conflict in the cases on the

§ 584. (d) **In New Jersey and Alabama.**—In New Jersey it was declared to be within the power of a court of equity to consolidate actions pending therein with or without the consent of the complainants, but that the order for consolidation is a matter of discretion and not of right, and upon such terms as the court may direct.<sup>1</sup> When the chief matter in controversy in two suits between the same parties is the same, and if that were settled there would be no substantial difference between them, and no possible injury can result, an order will be made, on motion, that the testimony taken in either suit may be used in the other, and that the hearing of both shall come on together.<sup>2</sup> In Alabama it was held that where two or more suits are pending in the same court of chancery asserting conflicting rights in the same property, and the facts of each case need to be ascertained before the rights of any can be definitely settled, they should be consolidated and heard together, or, if that cannot be done, the suit involving the more important questions ought to be first determined and the hearing of the others stayed in the meanwhile.<sup>3</sup>

§ 585. (e) **In Tennessee.**—Chancellor Cooper of Tennessee, after a careful examination of the authorities on the subject of consolidation,<sup>4</sup> concluded as follows:—"I am of opinion

subject, some of them holding certain limitations on the power which others reject. . . . We shall not attempt to review or reconcile the cases, but must determine the question on what seems to us the better reason." See, also, *Campbell's Case*, 2 Bland Ch. 209; *Grant v. Davis* (Ind.), 81 N. E. Rep. 587. As to the later practice in England, before the modern judicature acts, in respect to consolidation and moving suits from one court to another for that purpose, see *Zambaco v. Cassaveth*, L. R. 11 Eq. Cas. 439, 442-444; *Rhodes v. Barrett*, L. R. 12 Eq. Cas. 479, 481; *Sayers v. Corrie*, L. R. 9 Ch. App. Cas. 52; *Lyall v. Weldhen*, L. R. 9 Ch. App. Cas. 287, 289; *Orrell v. Busch*, L. R. 5 Ch. App. Cas. 467.

<sup>1</sup> *Burnham v. Dalling*, 16 N. J. Eq.

310. See Chancellor Cooper's reference to this case in the first note to the following section (at p. 589).

<sup>2</sup> *Evans v. Evans*, 23 N. J. Eq. 180. Where two bills were filed by the executors of two testators, who were tenants in common of all their property and devised it to the same persons, and the parties interested and their rights were the same under both wills, the court recommended upon the argument that the suits be consolidated, so that one investigation and report of the master and one decree might settle the matter. *Ex'rs of Conover v. Conover*, 1 N. J. Eq. 404.

<sup>3</sup> *Ex parte Brown*, 58 Ala. 536.

<sup>4</sup> In *Knight v. Ogden and Ogden v. Knight* (1877), 8 Tenn. Ch. 396, 410, where he discussed the matter as fol-

that the court of chancery has no power to interfere with the rights of the parties *in invitum* by an order consolidating independent suits of purely equitable cognizance. And if, in the breaking down of the lines of distinction between law and

laws:—"The books of equity practice are entirely silent on the subject of consolidation of causes in this court, from which fact the inference may be fairly drawn that no such practice exists. In *Keightly v. Brown*, 16 Ves. 844, Sir Samuel Romilly argued in support of a motion of consolidation made by defendants in several suits by a rector for an account of tithes, the motion being made as of course. But Lord Eldon was manifestly ignorant of any practice of consolidating causes in equity, for he said:—'I will consult some of the barons of the Exchequer, not seeing my way very clearly to determine what ought to be the practice here.' On a subsequent day he said he had mentioned the point to Baron Thompson, who had no idea that the order was of course in the Court of Exchequer, though sometimes made under special circumstances. The order was therefore not made. The note to this case is as follows:—'There are cases, no doubt, in which the Court of Exchequer has ordered several causes brought for the same matters involving the like questions and seeking the same relief to be consolidated. *Scott v. Allgood*, cited in *Fowler's Ex. Pr.* 81; *Mason v. Craft and Pyke v. Brook*, *Fowler's Ex. Pr.* 214. But this court, both when sitting as a court of law and when sitting as a court of equity, has in later cases disapproved that practice. *Le Jeune v. Sheridan*, *For. Ex.* 31; *Foreman v. Blake*, 7 Price, 654; *Foreman v. Southward*, 8 Price, 575.' In *Foreman v. Blake* Chief Baron Richards said:—'I have never heard of an

order in the course of my experience for consolidating causes in equity, nor can I conceive upon what principle it can be done.' The *Warden and Fellows of Manchester College v. Isherwood*, 2 Sim. 476, was a case where the plaintiffs had filed sixteen bills for tithes against different persons who made the same defense and moved for consolidation of the causes. The vice-chancellor reviewed the authorities, concluding thus:—'It is evident, therefore, that neither in this court nor in the Court of Exchequer has the practice prevailed of compelling the plaintiff to consolidate his different suits against several defendants; and the present motion, being a mere experiment in opposition to practice, must be refused with costs.' In *Cumming v. Slater*, 1 Y. & C. C. C. 484, the vice-chancellor refused to make a decree for accounts, it appearing that in another suit a decree for the same accounts had been rendered, the plaintiff in this suit being by the decree an acting party in the other, and directed the cause to stand over and come on with the other suit upon the hearing of that cause on further directions. But in *Godfrey v. Maw*, 1 Y. & C. C. C. 485, the same learned judge refused to extend the rule to cases where the two suits were between the same parties and involving the same subject-matter, the frame of the two suits and the relative position of the parties to each not being the same. And see *Wendell v. Wendell*, 8 Paige, 509, where the chancellor held that one of two bills of foreclosure was unnecessary and refused to allow the heirs of the

equity and the blending of the jurisdiction of the courts, cases should arise which in analogy to the rule of law might be consolidated, the exercise of such power should be declined, except in extreme and clear cases.”<sup>1</sup>

mortgagor to be charged with the costs of more than one, giving the solicitor, who was the same in both suits, leave to elect in which suit he would take a decree. These latter cases indicate the mode in which the court, without consolidation, may control unnecessary litigation. In *Burnham v. Dalling*, 16 N. J. Eq. 810, Chancellor Green expressed the opinion that a court of equity had the power to consolidate causes with or without the consent of the complainant, and he ordered three suits of three different wards against the same guardian, *after a decree rendered in each case*, at the instance of complainants, to be consolidated for the purpose of taking the accounts, *there being written consent to the consolidation*. The chancellor's opinion as to the power of the court was consequently a mere *dictum*. He concedes that even at law the mode of consolidation is not by uniting the several causes in one record. *Clason v. Church*, 1 Johns. Cas. 29. And our Supreme Court has held that consolidation of causes, partly by consent and partly by order of the court, acquiesced in by the parties, does not change the rules of equity pleading nor the rights of the parties, and that these rights must still turn on the pleadings, proof and proceedings of their respective suits. *Brevard v. Summar*, 2 Heisk. 105; *Lofland v. Coward*, 12 Heisk. 546. The general rule undoubtedly is that every suitor should be at liberty to direct his suit as he may be advised. The court ought to have no authority to hamper him by tying him to other parties and compelling him to

await their action or be subject to the delays incident to their judgment, whim or other fate, as by death or marriage. There is even less reason for forcing defendants against their wishes into a boat with others; for having been brought into court by one party they may well say, ‘We prefer to fight it out with that party.’ Nor is there any particular advantage to be gained by a consolidation *in invitum* where each record must after all be kept separate and stand or fall on its own merits. Such matters should be left exclusively to the parties, whose self-interest will dictate a better agreement for both than the court can enforce upon either. And the matter of costs is always in the discretion of the court, to be used so as to prevent a multiplicity of suits and decrees from proving profitable where such multiplicity is possible.”

<sup>1</sup> *Knight v. Ogden and Ogden v. Knight* (1877), 8 Tenn. Ch. 396, 410. In addition to the cases cited by the chancellor in the preceding note, see, also, *Mowry v. Davenport* (1880), 6 Lea, 80; *Estil v. Decherd*, 4 Baxt. 515; *Masson v. Anderson* (1873), 3 Baxt. 290, 299; *Hatcher v. Royster*, 14 Lea, 222. In *Rodgers v. Dibrell* (1880), 6 Lea, 69, it was held that where the defendant in two separate suits against him by different judgment creditors to reach the same land makes one answer to both bills he thereby virtually consolidates them so that they might properly be heard together as one cause or as two causes under one style, without any order of consolidation, and in *Ogburn v. Dunlap*, 9 Lea, 162, that an

**§ 586. Stipulations relating to causes, when enforced.**—Agreements of counsel during the progress of a cause ordinarily tend to the dispatch of business and should be favored by the courts.<sup>1</sup> It is a general rule that stipulations between the parties or counsel in a cause will not be recognized by the court unless they are in writing or made in open court,<sup>2</sup> “except so far as admitted by the parties against whom they are sought to be enforced.”<sup>3</sup> Correspondence between counsel containing propositions not accepted will not, although the proposals are afterward orally agreed to, constitute a valid stipulation “in writing” within the terms of a rule of court.<sup>4</sup>

**§ 587. The same subject continued.**—Agreements of counsel in regard to the trial of a cause are not absolute, although in writing, and will not be enforced under all circumstances. It rests in the sound discretion of the court to sustain them or to set them aside, and in the exercise of this discretion and to promote justice, it is not uncommon to relieve parties from the obligations thus incurred.<sup>5</sup> The right

appeal by one of several complainants in independent suits which were, by order of the court, consolidated and heard together, brought up only his own case, leaving the decree as to the others in full force. *Cf.* *Cable v. Ellis*, 86 Ill. 525. In *Putnam v. Lyon* (Colo.), 82 Pac. Rep. 492, the court refused to reverse a decree on account of an order of consolidation where no harm accrued therefrom.

<sup>1</sup> *Porter v. Holt*, 78 Tex. 447. See § 582, *supra*.

<sup>2</sup> *Parker v. Root*, 7 Johns. 820; *Dubois v. Roosa*, 8 Johns. 145; *Huff v. State*, 29 Ga. 424; *Shippen's Lessee v. Bush*, 1 Dall. 250; *Haylen v. Missouri Pac. R. Co.*, 28 Neb. 660; s. c., 44 N. W. Rep. 878; *Taylor v. Chicago &c. Ry. Co.*, 80 Iowa, 481; s. c., 46 N. W. Rep. 64; *Lee v. Simpson*, 42 Fed. Rep. 484; *Evans v. State Nat. Bank*, 19 Fed. Rep. 676; § 582, *supra*. A stipulation or engagement made by a party in the face of the court

touching the subject-matter of the litigation is a contract with the court as well as the adverse party, which the court is bound to enforce for the protection of the latter. *Banks v. American Trust Co.*, 4 Sandf. Ch. 488; *Jewett v. Albany City Bank*, Clarke's Ch. 241.

<sup>3</sup> *Reese v. Mahoney*, 21 Cal. 305, holding that stipulations will not be enforced where there is unreasonable delay in the application.

<sup>4</sup> *In re Keller's Will*, 7 N. Y. Supl. 199; s. c., 28 Abb. N. C. 376; 18 N. Y. Civ. Pro. 30. It was held in *Jackson v. Cole*, 81 Mich. 440; s. c., 45 N. W. Rep. 826, that a stipulation signed by the parties to a suit providing for a dismissal of the bill and the affirmation of a judgment was not valid if made without the knowledge or consent of the plaintiff's counsel.

<sup>5</sup> *Barry v. Mut. L. Ins. Co.*, 53 N. Y. 536, 540; *Culler v. Platt* (Tex.), 16 S. W. Rep. 1008; *Malin v. Kinney*, 1

of a party to be relieved does not depend upon the strict rules of law; but a stipulation will be set aside where it appears that it was given unadvisedly, and that it would be inequitable to hold him to it and that the other party has not been prejudiced thereby.<sup>3</sup>

§ 588. **Scope of stipulations limited.**— Counsel cannot stipulate as to what the law is so as to bind the court.<sup>2</sup> It is also a well-established principle that jurisdiction of the subject-matter involved cannot be conferred by stipulation;<sup>3</sup> nor will the court sanction agreements in evasion of the settled rules of law founded on considerations of public policy, as, for instance, an agreement permitting a wife to be a witness for or against her husband.<sup>4</sup>

§ 589. **Who are bound by stipulations.**— A stipulation entered of record will not bind parties who come in as intervenors after it is made and who did not assent to it.<sup>5</sup> Where two suits by different complainants against the same defendant were consolidated, a stipulation by one of the complainants for a stay of proceedings and a continuance was held not to bind the other, who was entitled, notwithstanding the agreement, to prosecute his claim to final judgment.<sup>6</sup>

Caines (N. Y.), 117; *The Hiram*, 1 Wheat. 440; *Gerdtzen v. Cockrell* (Minn.), 55 N. W. Rep. 58; *Tanziede v. Jumel* (N. Y.), 84 N. E. Rep. 274; *s. c.*, 58 N. Y. St. Rep. 4; *Buck v. Farralt*, 8 P. Wms. 242; *People v. Mayor*, 11 Abb. Pr. 74; *Quinn v. Lloyd*, 7 Rob. (N. Y.) 542; *Ferris v. Crawford*, 2 Denio, 595, 604; *Stonesifer v. Kilburn*, 94 Cal. 38, a case of excusable mistake; *McClure v. Sheek's Heirs*, 68 Tex. 426; *Hancock v. Winans*, 20 Tex. 320; *Milbank v. Jones*, 17 N. Y. Supl. 464, where the court declined to grant relief, the party applying having been guilty of laches; on which point, see, also, *People v. Board &c.*, 15 N. Y. Supl. 580.

<sup>1</sup> *Sperb v. Metropolitan El. Ry. Co.*, 10 N. Y. Supl. 865.

<sup>2</sup> *Breeze v. Haley*, 11 Colo. 851. See, also, *Lee v. Simpson*, 42 Fed. Rep. 484; *Little v. Giles*, 118 U. S. 596.

<sup>3</sup> *In re Keeler's Will*, 7 N. Y. Supl. 199, citing *Griswold v. Sheldon*, 4 N. Y. 581; *McMahon v. Rauhr*, 47 N. Y. 67; *Davidsburg v. Knickerbocker Ins. Co.*, 90 N. Y. 526. See, also, *Cunningham v. State* (Tex.), 11 S. W. Rep. 871.

<sup>4</sup> *Barker v. Dixie*, Rep. t. Hardw. 252; *Owen v. Thomas*, 8 M. & K. 353, 357. For the construction of stipulations relating to evidence in the cause, see § 582, *supra*.

<sup>5</sup> *Kneeland v. Luce*, 141 U. S. 487.

<sup>6</sup> *Midland R'y Co. v. Island Coal Co.*, 126 Ind. 384.



§ 590. The same subject continued — Effect upon infant parties.— A stipulation by an attorney that the action shall abide the event of another action pending binds his adult clients, subject to the power of the court to set it aside or disregard it if improvidently, fraudulently or collusively made.<sup>1</sup> Stipulations in writing by counsel for the guardian *ad litem* of an infant defendant which apparently waive or surrender any material right of the minor, such, for instance, as the right to a trial, are not binding upon the infant, unless approved and ratified by the court upon a showing that they are beneficial, or at any rate not prejudicial, to his rights and interests. Thus, it is error for a court to enforce a stipulation that the suit shall follow the event of another action then pending, if it appears that the matters in controversy in the two actions are not precisely the same, or that he is represented in those actions by different guardians *ad litem*.<sup>2</sup>

§ 591. Construction of stipulations — Parol evidence.— A written stipulation is to be construed according to the import of the language it contains in view of the circumstances under which it was made.<sup>3</sup> And the construction placed upon it by the trial court will not be disturbed on appeal if it is fairly susceptible of such interpretation.<sup>4</sup> A

<sup>1</sup> *Eidam v. Finnegan* (Minn.), 50 N. W. Rep. 933. See, also, *Bingham v. Supervisors*, 6 Minn. 186; *Rogers v. Greenwood*, 14 Minn. 383; *Bray v. Doheny*, 89 Minn. 355.

<sup>2</sup> *Eidam v. Finnegan* (Minn.), 50 N. W. Rep. 933. It has been held that an infant defendant is not bound by the admissions of his guardian *ad litem* either in his answer or for the purpose of the trial. *Ashford v. Patton*, 70 Ala. 479; *Quigley v. Roberts*, 44 Ill. 508; *Tucker v. Bean*, 65 Me. 352; *Nevins v. Baird*, 19 Hun, 306. See § 890, *supra*. But in *Eidam v. Finnegan*, *supra*, the court insists that the guardian *ad litem* has power to make concessions or admissions such as are ordinarily made in the progress of a cause, and which are

entirely consistent with good faith. In *Franklin Sav. Bank v. Taylor* (C. C. App.), 53 Fed. Rep. 854, 865, it was held that an apparently regular decree against an infant ought not to be set aside because of an alleged agreement or consent of the guardian *ad litem*, which is not referred to in the record, except upon allegation and proof that such agreement was not beneficial to the infant, or for some other reason ought not to have been made. See, also, *Walsh v. Walsh*, 116 Mass. 377.

<sup>3</sup> *Schroeder v. Frey*, 14 N. Y. Supl. 71. See, also, § 532, *supra*.

<sup>4</sup> *Foster v. Dickerson* (Vt.), 24 Atl. Rep. 253, 261. Where the stipulation is susceptible of a reasonable interpretation the court will not adopt a



stipulation of the parties and finding of the court thereon will be construed, on appeal, with reference to existing laws affecting the subject-matter.<sup>1</sup> Where the terms of the stipulation are not ambiguous, testimony is not admissible to prove the understanding or intention of the parties.<sup>2</sup>

**§ 592. Discharging a party from stipulations.**—Whether the causes assigned are sufficient to justify the court in discharging a party from his stipulation is ordinarily a matter addressed exclusively to the discretion of the court, and will not be reviewed on appeal, especially where the parties can be restored to the same condition in which they would have been if no agreement had been made.<sup>3</sup> But where the agreement involves something more than a mere matter of practice and affects the substance of the cause of action or the character of the defense, and it appears that it has been entered into by counsel without a knowledge of the facts, and that its withdrawal will not operate to the prejudice of either party, the motion to set aside ceases to be a matter of mere discretion and should be granted by the court.<sup>4</sup> Thus where the court, upon the plaintiff's motion, proceeded to trial and rendered judgment for the plaintiff in the defendant's absence, notwithstanding a written agreement on file stipulating for a continuance, the judgment was reversed on appeal.<sup>5</sup>

**§ 593. Orders — Who may grant orders.**—Interlocutory orders are either of course or special. Orders of course are those

construction at the instance of one of the parties which necessarily imputes an intention on his part to mislead or deceive the court. *Citizens' Bank v. Farwell*, 56 Fed. Rep. 570.

<sup>1</sup> *Utah &c. Ry. Co. v. Fisher*, 116 U. S. 28.

<sup>2</sup> *Schroeder v. Frey*, 14 N. Y. Supl. 71, following *Schroeder v. Frey*, 114 N. Y. 26; s. c., 21 N. E. Rep. 410. *Mussey v. Curtis*, 60 Vt. 271, distinguishing *Flint v. Johnson*, 59 Vt. 190. A stipulation setting forth that one case shall "abide the event" of another means that it shall abide the

"ultimate result." *Niagara Fire Ins. Co. v. Scammon*, 85 Ill. 582. *Cf.* *Kimberlin v. Tow* (Ind.), 33 N. E. Rep. 770. Such a stipulation is binding so long as the causes of action continue the same. *Galbreath v. Rogers*, 45 Mo. App. 324. See, also, *Dilworth v. Curtis*, 139 Ill. 508; s. c., 29 N. E. Rep. 861. *Cf.* *Little v. Giles*, 118 U. S. 596.

<sup>3</sup> *Barry v. Mut. L. Ins. Co.*, 53 N. Y. 536, 540; *Porter v. Holt*, 78 Tex. 447.

<sup>4</sup> *Porter v. Holt*, 78 Tex. 447, reversing a decree of the trial court.

<sup>5</sup> *McBride v. Settles* (Tex.), 16 S. W. Rep. 422.

to which no opposition can be offered, and are drawn up without any direct application to the judge.<sup>1</sup> Special orders are those which the court, in the exercise of its discretion, may either refuse or grant.<sup>2</sup> "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation except such as are expressly authorized by statute."<sup>3</sup> The United States circuit courts are "deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing of all causes upon their merits."<sup>4</sup> "For the purposes of jurisdiction the chambers of a judge are wherever he happens to be in his circuit or district when the exigencies of the case call for the transaction of chamber business."<sup>5</sup> A United States district judge who has, under order of the circuit judge, tried a case in another district, has jurisdiction to pass upon a motion for a new trial in the case, even after he has returned to his own district, where the parties waive his returning to the other district for the purpose of deciding the motion.<sup>6</sup> Where a judge of the United States district court for the district in which a bill is filed, and the circuit judge for the circuit and the justice of the Supreme Court allotted to that circuit are all absent from the district and circuit, another justice of the Supreme Court has jurisdiction at any place in the United States to hear an application for an injunction.<sup>7</sup> An order made by a judge after a successor has qualified and assumed the duties of the office, with full recognition by his predecessor, is void and will be vacated on motion.<sup>8</sup> Where an interlocutory order has been passed upon

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1589.  
See § 557, *supra*.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1589.  
See § 558, *supra*.

<sup>3</sup> Blair v. Reading, 99 Ill. 600, 609.

<sup>4</sup> Equity Rule 1. By rule 111 of the United States circuit court for the southern district of New York, "all special motions in reference to matters of practice may be made in open court or before a judge at chambers."

<sup>5</sup> Per Sawyer, J., in *In re Neagle*, 89 Fed. Rep. 888, 855, 856. See further as to jurisdiction at chambers, § 16, *supra*.

<sup>6</sup> Cheesman v. Hart, 42 Fed. Rep. 98.

<sup>7</sup> United States v. Louisville & Canal Co., 4 Dill. 601. See U. S. R. S., § 719; Searles v. Jacksonville & C. R. Co., 2 Woods, 621.

<sup>8</sup> United States v. Alexander, 46 Fed. Rep. 728.

and adjudicated by one judge it will not be reconsidered and reviewed by another judge of the same court in the same case.<sup>1</sup> Where, in pursuance of leave granted, an amended bill is filed, which, however, omits one of the defendants in the original bill, it will be presumed on appeal, in the absence of affirmative showing to the contrary, that leave was granted to dismiss the bill as to the omitted defendant.<sup>2</sup> An order, although signed by the judge, is of no efficacy until it is delivered to the clerk to be filed.<sup>3</sup>

**§ 594. Service of orders.**—It is a general rule that all orders which are to have the effect of requiring or limiting any act of the opposite party to be done within a specified time, or to bring him into contempt for disobedience, must be served or actual notice thereof given.<sup>4</sup> If a party in whose favor an interlocutory order or decree is made wishes to limit his adversary's right of appeal, he must serve a copy of the order or decree as entered, or give him a written notice of the entry thereof,<sup>5</sup> except where the solicitor of the opposite party has himself drawn up and entered such order.<sup>6</sup> Where it is intended to enforce the order by process of contempt, the service of the order must be personal upon the party to be affected by it, unless a special order has been obtained for substituted service.<sup>7</sup> And it is absolutely necessary that the original order should be shown at the same time that the copy is served, unless the production of the

<sup>1</sup> *Oglesby v. Attrill*, 14 Fed. Rep. 214; *Cole Silver Min. Co. v. Virginia &c. Co.*, 1 Sawy. 685, 689.

<sup>2</sup> *Hicklin v. Marco*, 56 Fed. Rep. 549.

<sup>3</sup> *United States v. Alexander*, 46 Fed. Rep. 728; *Danielson v. Northwestern Fuel Co.*, 55 Fed. Rep. 49. See, also, *Whitney v. Belden*, 4 Paige, 140; *Earl of Fingal v. Blake*, 2 Molloy, 50.

<sup>4</sup> 2 Barbour's Ch. Pr. (2d ed.) 590; 3 Daniell's Ch. Pr. (1st ed.) 271.

<sup>5</sup> *Tyler v. Simmons*, 6 Paige, 127. Personal service may be dispensed with where the party cannot be found. *Jackson v. —*, 2 Ves. Jr. 417.

<sup>6</sup> *Farley v. Farley*, 7 Paige, 40.

<sup>7</sup> 8 Daniell's Ch. Pr. (1st ed.) 271; *Re Carey*, 10 Fed. Rep. 622; *Hunter v. —*, 6 Sim. 429; *Young v. Goodson*, 2 Russ. 255; 2 Barbour's Ch. Pr. (2d ed.) 590; *Lorton v. Seaman*, 9 Paige, 609; *People v. Brower*, 4 Paige, 405. Where a previous notice of a motion or other proceeding in a suit is required to be given, the whole of the day on which the notice is served is included in the computation of time, and the day upon which the motion is to be made or other proceeding had is excluded. *Vandenburgh v. Van Rensselaer*, 6 Paige, 147.

original is waived.<sup>1</sup> It is not absolutely necessary that a paper should have been filed at the moment the copy thereof is served, provided it is filed the same day, unless some proceeding has been taken in the meantime to render such subsequent filing improper. But service of a paper is not perfect until the original is actually delivered to the proper officer to be filed.<sup>2</sup>

**§ 595. Proceedings touching irregularities.**—Where a party seeks to set aside the proceedings of his adversary for an irregularity which is merely technical, he must make his application for that purpose at the first opportunity. If a solicitor, after notice of an irregularity, takes any step in the cause, or lies by and suffers his adversary to proceed therein under a belief that his proceedings are regular, the court will not interfere to correct the irregularity if it is merely technical.<sup>3</sup> But it is otherwise where the order is void, for in that case nothing can make it valid.<sup>4</sup> An application to set aside proceedings for a mere technical irregularity must be made upon the first opportunity.<sup>5</sup> Where the defendant neglects to appear and oppose a motion for an order directing him to deliver certain articles to the master, he cannot afterwards resist a motion for an attachment against him for his non-compliance with the order by showing that such order ought not to have been obtained. He should have applied to open the motion or vacate the order.<sup>6</sup> An *ex parte* order, under the immediate direction of the court, although irregularly obtained, cannot be treated by the adverse party as a nullity; and a common order entered contrary to such special order and treating it as a nullity is itself irregular. But if the court afterwards sets aside the special order, leaving the common order in full force, the latter will be made regular by relation as of the time when it was entered.<sup>7</sup> A mere notice from a party that he

<sup>1</sup> 2 Barbour's Ch. Pr. (2d ed.) 590; Wallis v. Glynn, 12 Ves. 380; s. c., Coop. 282. But see Stafford v. Brown, 4 Paige, 860.

<sup>2</sup> Quincy v. Foot, 1 Barb. Ch. 496.

<sup>3</sup> Crowell v. Botsford, 16 N. J. Eq. 458; Johnston v. Bloomer, 3 Edw. Ch. 328.

<sup>4</sup> Johnston v. Bloomer, 3 Edw. Ch. 328.

<sup>5</sup> Parker v. Williams, 4 Paige, 439; Ex'rs of Brasher v. Van Cortlandt, 2 Johns. Ch. 242; Skinner v. Dayton, 5 Johns. 191.

<sup>6</sup> Higbie v. Edgerton, 3 Paige, 253.

<sup>7</sup> Studwell v. Palmer, 5 Paige, 166.

intends to proceed in a manner which would be irregular does not make it necessary for the adverse party to apply to the court on the subject until some proceeding in the cause is had which is irregular and inconsistent with the rights of such adverse party.<sup>1</sup> Where a party by a slip has lost the opportunity to set up a mere technical or unconscientious defense, and comes to the court for a favor which it is necessary should be granted to enable him to set up such defense, the court will require him to do equity as a condition of granting the favor asked.<sup>2</sup>

§ 596. **Terms of orders — Nunc pro tunc orders.**— Where a party obtains an order for relief from a regular proceeding against him in the suit, upon certain terms to be performed by him as a condition of such relief, he must seek the solicitor of the adverse party, and perform or comply with such terms, or he will lose the benefit of the order.<sup>3</sup> An order requiring a defendant to attend before a master and comply with the order of reference in a creditor's suit and to pay the costs, or show cause why an attachment should not issue against him, should specify the amount of the costs which the defendant is to pay.<sup>4</sup> Where one who filed a bill to enjoin the sale of property asked to have the property left in his custody during the pendency of the litigation, upon terms that he return it when so ordered, the court can make an affirmative order compelling him to return or pay the value of the property.<sup>5</sup> On motion to set aside an invalid order the other party cannot on such motion be let in on terms; he must make a motion for that purpose.<sup>6</sup> Where a subsequent proceeding in a cause is required to be had within a limited time, as within a certain number of days from or after the entry of an order or the service of a notice or other paper, the whole of the first day is to be excluded from the computation of time.<sup>7</sup> An order of the court made upon a motion is not *res adjudicata* in such

<sup>1</sup> *Vandenburgh v. Van Rensselaer*, 6 Paige, 147.

<sup>2</sup> *Hartson v. Davenport*, 2 Barb. Ch. 77.

<sup>3</sup> *Hoffman v. Treadwell*, 5 Paige, 82.

<sup>4</sup> *Hammersley v. Parker*, 1 Barb. Ch. 25.

<sup>5</sup> *Moore v. Diamant*, 41 N. J. Eq. 612.

<sup>6</sup> *Johnston v. Bloomer*, 8 Edw. Ch.

<sup>7</sup> *Vandenburgh v. Van Rensselaer*,

6 Paige, 147.

a sense as to conclude the court as to points of law involved in its decision, whether arising in the same case or in another.<sup>1</sup> A *nunc pro tunc* order is always admissible when the delay has arisen from the act of the court.<sup>2</sup> Application to enter an order *nunc pro tunc* is a motion of course where the party entitled to the order comes recently; but after considerable delay notice should be given.<sup>3</sup>

§ 597. **Modifying and vacating orders.**—It is a general rule that every order made in the progress of a cause may be rescinded or modified upon a proper showing of mistake, surprise or irregularity.<sup>4</sup> Where an order is improper, the course for the injured party is to apply to open the motion or vacate the order.<sup>5</sup> Where the facts are all before the court, an application to vacate a decree or set aside an order may be made upon motion merely; it is not necessary to file a petition.<sup>6</sup> And *ex parte* orders made upon petition may be vacated upon motion for irregularity.<sup>7</sup>

§ 598. **Nature and use of affidavits.**—An affidavit is an oath in writing, sworn to before some person who has authority to administer an oath.<sup>8</sup> Affidavits are generally resorted to in support of, and in opposition to, interlocutory applications, or for certifying the service of process, notices, etc., and may also be used in support of the bill or of the answer. The United States courts have “power to impose and administer

<sup>1</sup> *Banks v. American Trust Co.*, 4 Sandf. Ch. 488.

<sup>2</sup> *Gray v. Brignardello*, 1 Wall. 627.

<sup>3</sup> 2 Barbour's Ch. Pr. (2d ed.) 585; *Anon.*, 8 Atk. 521. See, also, *Williamson v. Henshaw*, 1 Dick. 129.

<sup>4</sup> *Ashe v. Moore*, 2 Mer. 383; *Fanning v. Dunham*, 4 Johns. Ch. 35; *Nelson v. Barker*, 8 McLean, 379; *Ealava v. Mazange*, 1 Woods, 623; *Doss v. Tyack*, 14 How. 297, 318.

<sup>5</sup> *Higbie v. Edgerton*, 3 Paige, 253.

<sup>6</sup> *Collins v. Ex'rs of Taylor*, 4 N. J. Eq. 163; *Gerrish v. Black*, 109 Mass. 474.

<sup>7</sup> *In re Marrow, Craig & Ph.* 142. See 2 Daniell's Ch. Pr. (2d ed.) 1808.

<sup>8</sup> 2 Barbour's Ch. Pr. (2d ed.) 597.

“Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.” United States Equity Rule 91. An affidavit, where nothing appears to show that it was taken out of the jurisdiction of the officer before whom it was sworn, will be presumed to have been taken within the limits of his jurisdiction. *Parker v. Baker*, 8 Paige, 428. But see *Lane v. Morse*, 6 How. Pr. 394.

all necessary oaths.”<sup>1</sup> Affidavits in the United States circuit or district courts may be taken by a commissioner of the circuit court for the district.<sup>2</sup> Affidavits made without the United States may be verified before any secretary of legation or consular officer within the limits of his legation, consulate or commercial agency.<sup>3</sup> It was one of Lord Clarendon's orders that the officer administering an oath should, if he sees the party to be rash or ignorant, admonish him and see that he read the affidavit or hear it read in the officer's presence.<sup>4</sup>

**§ 599. Title of an affidavit.**—An affidavit must be correctly entitled in the cause or matter in which it is made; for an affidavit made in one cause cannot be read to obtain an order in another.<sup>5</sup> It will be sufficient if it was correctly entitled when it was sworn, although the title of the cause may have been subsequently altered by amendment.<sup>6</sup> In proceedings for contempt against a witness or other person not a party to the suit, all affidavits subsequent to the order for

<sup>1</sup> U. S. R. S., § 725. Whether the court may compel a person to have his affidavit taken, *quære*. *Hammer-schlag Mfg. Co. v. Judd*, 26 Fed. Rep. 292; *Bacon v. Magee*, 7 Cowen, 515; *Day v. Boston Belting Co.*, 6 Law Rep. (N. S.) 329.

<sup>2</sup> U. S. R. S., § 945.

<sup>3</sup> U. S. R. S., § 1750. In *Pinkerton v. The Barnsley Canal Co.*, 3 Y. & J. 277, n., Lord Eldon directed in an order that the court would receive an affidavit sworn out of the jurisdiction, provided “it should be shown that the person before whom the affidavit purports to have been sworn is, according to the law of the country in which it is sworn, qualified to administer an oath, and that the signature of such person should be properly verified.” As to verification of the signature of a magistrate, see *Lord Kinnauld v. Lady Saltoun*, 1 Mad. 227; *Garvey v. Hilbert*, 1 J. & W. 180. By the law of nations a notary public has credit everywhere.

See *Hutcheon v. Mannington*, 6 Ves. 828.

<sup>4</sup> Beames' Orders, 209. If the deponent is blind the officer should certify in the jurat that the affidavit was carefully and correctly read over to him in the presence of such officer before he swore to the same. *Matter of Christie*, 3 Paige, 242, holding, also, that where a petition or affidavit is sworn to by a person who has been found a lunatic by inquisition, the officer before whom the same is sworn should state in the jurat that he had examined the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind and capable of understanding the nature and contents of the petition or affidavit.

<sup>5</sup> 3 Daniell's Ch. Pr. (1st ed.) 288; 2 Barbour's Ch. Pr. (2d ed.) 600; Gibson's Suits in Chancery, § 770.

<sup>6</sup> 3 Daniell's Ch. Pr. (1st ed.) 288; *Hawes v. Bamford*, 9 Sim. 658.



the attachment should be entitled in the name of the State on the relation of the party prosecuting the attachment.<sup>1</sup> Where the parties are numerous it is sufficient to give the name of the first complainant and of the first defendant, adding "and others" or "*et al.*," without setting forth the names of all the defendants at length.<sup>2</sup> In ordinary cases the court will disregard the misentitling of a paper which could not have misled the opposite party, except in the case of sworn papers, when such misentitling would exempt the deponent from the punishment of perjury, although his oath is false.<sup>3</sup>

**§ 600. Form of an affidavit.**—The venue should appear on the face of the affidavit, so that it may be known in what county and State the oath was taken. The venue may be placed next below the title of the cause, or it may be prefixed to the jurat. If the affidavit is sworn to in open court, and the jurat so shows, that is sufficient evidence of the venue.<sup>4</sup> The true place of residence, description and addition of every person swearing the same must be inserted, except that parties to the cause may describe themselves in an affidavit as the above-named plaintiff (or defendant), without any further description.<sup>5</sup> Affidavits ought to be fairly and legibly written, in one hand, without blots, or interlineations of any words of substance; otherwise the officer administering the oath may refuse to swear them, or the register may refuse to file them.<sup>6</sup> Where, however, small blots or interlineations happen, the officer usually marks them in the margin with his initials.<sup>7</sup> After the substance of the affidavit has been stated, the affidavit usually concludes with a denial of any further knowledge on the subject, thus: — "And further this deponent saith not." This formality, however, is not essential to its validity.<sup>8</sup> The person swearing to an affidavit must subscribe his name

<sup>1</sup> *Stafford v. Brown*, 4 Paige, 360.

<sup>5</sup> 3 Daniell's Ch. Pr. (1st ed.) 239;

<sup>2</sup> 2 Barbour's Ch. Pr. (2d ed.) 601; *White v. Hess*, 8 Paige, 544; *Gibson's Suits in Chancery*, § 770.

*Maury v. Van Arnum*, 1 Hill, 870.

<sup>6</sup> 2 Barbour's Ch. Pr. (2d ed.) 603; 3 Daniell's Ch. Pr. (1st ed.) 240.

<sup>3</sup> *Hawley v. Donnelly*, 8 Paige, 415.

<sup>7</sup> 2 Barbour's Ch. Pr. (2d ed.) 603;

<sup>4</sup> *Gibson's Suits in Chancery*, § 770.

3 Daniell's Ch. Pr. (1st ed.) 241.

See *Mosher v. Heydrick*, 45 Barb. 549;

<sup>8</sup> 2 Barbour's Ch. Pr. (2d ed.) 603;

*Cook v. Staats*, 18 Barb. 407;

*Gibson's Suits in Chancery*, § 770.

*Belden v. Devoe*, 12 Wend. 228.

at the foot thereof on the right side.<sup>1</sup> If the affiant cannot sign his own name, he should make his mark, and his signature should be duly witnessed.<sup>2</sup> The deponent must be duly sworn to the truth of the contents of his affidavit.<sup>3</sup> The officer administering the oath must also certify that fact in a jurat written at the foot of the affidavit upon the left-hand side; the jurat should be duly dated and signed officially.<sup>4</sup>

**§ 601. Scandal and impertinence in affidavits.**—Scandalous and irrelevant matter should be carefully avoided, and if inserted such matter may be expunged by the same process as scandal and impertinence in a bill or other pleading.<sup>5</sup> It is competent for the court, upon the mere examination of an affidavit or other paper read before it on a motion, to order scandalous or impertinent matter contained in it to be expunged without a reference to a master and to charge the proper party with the costs.<sup>6</sup> Where the court itself directs an affidavit to be referred to a master for impertinent or scandalous matter, there is no occasion to go into the master's office with formal exceptions. The order to refer is enough.<sup>7</sup> The solicitor who draws and the counsel who signs a scandalous or impertinent pleading or proceeding are personally liable for the costs of expunging the matter, and ought to be charged therewith in the first instance.<sup>8</sup> The court will not

<sup>1</sup> 2 Barbour's Ch. Pr. (2d ed.) 608; Gibson's Suits in Chancery, § 770; Hathaway v. Scott, 11 Paige, 178.

<sup>2</sup> Gibson's Suits in Chancery, § 770.

<sup>3</sup> The oath administered is as follows:—"You swear that the contents of this affidavit by you subscribed are true. So help you God." If the deponent is a Quaker the words are:—"You solemnly, sincerely and truly declare and affirm," etc., omitting the words "so help you God." 2 Barbour's Ch. Pr. (2d ed.) 608.

<sup>4</sup> Gibson's Suits in Chancery, § 770. Any irregularity in the form of the affidavit or of the jurat will be a ground for its rejection by the court. 3 Daniell's Ch. Pr. (1st ed.) 241. See, also, Laimbeer v. Allen, 2 Sandf. 648.

The mere omission of the date of the jurat has been considered not a fatal objection. Schoolcraft v. Thompson, 7 How. Pr. 446.

<sup>5</sup> 3 Daniell's Ch. Pr. (1st ed.) 240. It is scandalous and impertinent to draw inferences or state arguments in the affidavit reflecting upon the character or impeaching the motives of the adverse party or his solicitor. Powell v. Kane, 5 Paige, 265.

<sup>6</sup> Powell v. Kane, 5 Paige, 265.

<sup>7</sup> Powell v. Kane, 2 Edw. Ch. 450.

<sup>8</sup> Powell v. Kane, 5 Paige, 265; *Ex parte* Smith, 1 Atk. 189. Where the solicitor of a party put impertinent and scandalous matter in his own affidavit used on a motion, he was ordered to pay the costs of re-

refer an affidavit for impertinence merely, where it is not also scandalous, after such affidavit has been answered.<sup>1</sup>

**§ 602. Substance of affidavits.**—An affidavit should give all the necessary circumstances of time, place, manner and other material incidents.<sup>2</sup> It must also be sufficient to sustain the case made by the motion or petition of which it is the groundwork.<sup>3</sup> Where the affidavit deposes to words spoken, it is a proper precaution to add “or words to that effect.”<sup>4</sup> It is to be observed, particularly, that every affidavit of service of writs or of orders, upon which process of contempt is to be founded, must truly and fully prove good service; and that if the complainant’s name, the court, the return of the writ, or anything material be omitted, no attachment can be thereupon regularly issued; for until a due service be shown, no contempt appears to the court.<sup>5</sup> An affidavit should give facts and not hearsay, opinions, inferences, or conclusions of law.<sup>6</sup> But allegations in an affidavit on a motion, made upon information and belief, if not controverted must be taken as true.<sup>7</sup> An affidavit by the defendant that he has a good defense, without stating the nature and substance of it, is not sufficient.<sup>8</sup>

ferring it and of a hearing upon exceptions taken by him to the master’s report. *Powell v. Kane*, 2 Edw. Ch. 450.

<sup>1</sup> *Matter of Burton*, 1 Russ. 880.

<sup>2</sup> 8 Daniell’s Ch. Pr. (1st ed.) 289; *Gibson’s Suits in Chancery*, § 770.

<sup>3</sup> 8 Daniell’s Ch. Pr. (1st ed.) 289; *Sea Ins. Co. v. Stebbins*, 8 Paige, 585; *Meach v. Chappell*, 8 Paige, 185.

<sup>4</sup> *Ayliffe v. Murray*, 2 Atk. 60.

<sup>5</sup> *Hinde*, 458; 8 Daniell’s Ch. Pr. (1st ed.) 289.

<sup>6</sup> *Gibson’s Suits in Chancery*, § 770. It is not sufficient in an opposing affidavit, where the adverse party has no opportunity to answer, to state a matter upon the belief of the deponent only. *Quincy v. Foot*, 1 Barb. Ch. 496.

<sup>7</sup> *Houston v. City of San Francisco*, 47 Fed. Rep. 887, 888. See, also, *Merritt v. Lyon*, 16 Wend. 405.

<sup>8</sup> *Sea Ins. Co. v. Stebbins*, 8 Paige, 653. An affidavit to set aside proceedings for irregularity should be made either by the party or his solicitor. The affidavit of the counsel is not sufficient, unless an excuse is shown for dispensing with the affidavit of the party or the solicitor. *People v. Spalding*, 2 Paige, 326. Where the veracity of the deponents to affidavits in support of a motion is impeached by the affidavits read at the hearing of the motion, the affidavits of such deponents will not be wholly rejected, nor will they be fully credited; but the affidavits upon both sides will be taken into consideration, with other circumstances, by

**§ 603. Paying money into court.**—There are many cases wherein the court will order money or choses in action to be paid into court before a final decree. The order is usually made on a defendant, but it may be made on the complainant also. The order is never made against a defendant unless it be shown that he has the money or chose in action in his possession or under his control, or that it belongs to the complainant, and that it is a trust fund.<sup>1</sup> A complainant will be ordered to pay money into court when on his own admissions in his bill he owes the defendant a certain sum which it is equitable he should pay before he can require the defendant to do equity, or before he can in good conscience ask the interposition of the court as against the defendant.<sup>2</sup> “Paying into court” and “bringing into court,” where these terms are used in the statutes and rules of court or in decrees, mean paying to or depositing with the register, assistant register or clerk of that branch of the court in which the suit is pending or the decree was rendered.<sup>3</sup> As a general rule, upon a bill filed against an executor or administrator for a distribution of the estate of the decedent, if it appears that there is a clear balance in his hands uninvested, beyond all just claims made by him upon the fund, such balance will be directed to be brought into court and invested pending the suit.<sup>4</sup> Under special circumstances a non-resident vendee of lands filing a bill for specific performance of the agreement to convey the lands to him was required to pay into court the consideration that was to have been paid at the time of the execution of the deed, though he was not in possession.<sup>5</sup> Where the subject of litigation was a fund in the hands of an insolvent assignee who was a defendant in the cause and had no personal inter-

the court, in deciding upon the merits of the motion. *Francis v. Church*, Clarke's Ch. 475.

<sup>1</sup> 1 Daniell's Ch. Pr. (5th ed.) 1770-1774; Gibson's Suits in Chancery, § 763.

<sup>2</sup> Gibson's Suits in Chancery, § 763. Where it appears from the answer of a defendant that he has in his hands a specific sum which he admits to be due to the complainant,

and other matters in the suit are contested, the court will order the admitted debt to be paid to the complainant without waiting for a final decree. *Clarkson v. De Peyster*, Hopk. Ch. 274.

<sup>3</sup> *Leavitt v. De Launay*, 4 Sandf. Ch. 480.

<sup>4</sup> *Hosack v. Rogers*, 6 Paige, 415.

<sup>5</sup> *Binns v. Mount*, 28 N. J. Eq. 24.

est therein but claimed the fund for the benefit of others, the money was ordered to be brought into court and invested to abide the further order of the court.<sup>1</sup> Where the right to a debt due from a third person is in litigation it cannot with safety be paid to either party after notice, but the debtor will be permitted, pending the litigation, to pay it into court to the credit of the cause.<sup>2</sup> Where a sum is reported to be due from a defendant and he acquiesces in the report, but the case is delayed by other questions, the court will sometimes order the reported sum to be paid into court.<sup>3</sup>

§ 604. **The same subject continued.**—Money will not be ordered to be paid into court which is not ascertained to be due by an account or decree in the cause, or admitted to be due by the answer or other proceedings in the cause. A parol admission proved by affidavit is not sufficient.<sup>4</sup> Where a vendor in a bill against him for specific performance is resisting performance and does not recognize a bargain, he cannot compel the vendee to pay the consideration into court.<sup>5</sup> Where a bill is filed to restrain proceedings on a judgment recovered at law, the court will not require the complainant to bring the amount of the judgment into court unless it is shown that there is danger of the complainant's insolvency.<sup>6</sup> When money has been paid into court upon an order, such payment is merely a collateral security, and is not to be taken as the property of the opposite party until so adjudged upon the hearing; it belongs to the party who may eventually be found entitled to it, and it may be ordered to be returned to the party paying it if on the hearing he show a

<sup>1</sup> *Haggerty v. Duane*, 1 Paige, 821.

<sup>2</sup> *Mills v. Pittman*, 1 Paige, 490.

<sup>3</sup> *Clarkson v. De Peyster*, Hopk. Ch. 274.

<sup>4</sup> *McTighe v. Wadleigh*, 22 N. J. Eq. 81, 83, where the court said:—"I know of no precedent for an order to pay money into court on proof by depositions that the defendant has admitted that he has received or that he has it."

<sup>5</sup> *Birdsall v. Waldron*, 2 Edw. Ch. 815. It is contrary to the practice of

the court to direct the payment of a gross sum by one party to another pending a suit and where there is no sum in court. *Bogert v. Bogert*, 2 Edw. Ch. 399. But see *Feldman v. Grand Lodge*, 19 N. Y. Supl. 78. No part of the fund in the defendant's hands will be ordered to be paid to a party pending the suit unless a clear balance is admitted by the defendant's answer. *Cooke v. Barker*, Hopk. Ch. 117.

<sup>6</sup> *Rodgers v. Rodgers*, 1 Paige, 426.

right to it.<sup>1</sup> An order for the payment or transfer of a fund should always be entitled in the cause to which the fund belongs. A fund may be transferred from one cause to another upon petition filed in the cause from which the transfer is sought, in which case there should be an order of record in the cause showing the transfer, and also an order of record in the cause to which the transfer is made, showing the receipt of the fund and whence derived.<sup>2</sup>

§ 605. Conduct of the cause.—As a general rule the prosecution of a decree devolves upon the plaintiff, he being considered to be in most cases the person principally interested in forwarding it.<sup>3</sup> A reference upon an interlocutory order is for the same reason usually prosecuted by the party obtaining it, whether plaintiff or defendant.<sup>4</sup> In the case of concurrent suits, the conduct of the proceedings is usually intrusted to the plaintiff in the first suit in point of time.<sup>5</sup> It will, however, if any sufficient reason appear, be intrusted to any other party, in which case it will be given, as a general rule, to the defendants or respondents having the greatest interest.<sup>6</sup> A creditor coming in under a decree may be permitted to prosecute the same on the ground of the plaintiff's delay, although he be not interested in the whole of the decree,<sup>7</sup> and notwithstanding the cause has abated by the death of a defendant.<sup>8</sup> Under like circumstances a defendant to a creditor's bill, after having been admitted as a co-complainant, may have the conduct of the cause committed to himself on terms as to indemnifying the complainant against future costs in the cause.<sup>9</sup> So in an administrator's suit;<sup>10</sup> or in a suit by

<sup>1</sup> 2 Daniell's Ch. Pr. (5th ed.) 1778.

<sup>2</sup> 2 Daniell's Ch. Pr. (5th ed.) 1808. The transfer may be made on motion if the facts sufficiently appear in the record. Gibson's Suits in Chancery, § 763, n.

<sup>3</sup> 2 Daniell's Ch. Pr. (5th ed.) 1169.

<sup>4</sup> 2 Daniell's Ch. Pr. (5th ed.) 1169.

<sup>5</sup> 2 Daniell's Ch. Pr. (5th ed.) 1169; Belcher v. Belcher, 13 W. R. 918.

<sup>6</sup> 2 Daniell's Ch. Pr. (5th ed.) 1169; Re Hutchinson, 1 Dr. & Sm. 27, 30.

<sup>7</sup> Edmunds v. Acland, 5 Madd. Ch. 81; Fleming v. Prior, 5 Madd. Ch.

428. See, also, Powell v. Walworth 2 Madd. 183; Price v. North, 2 Y. & Coll. (Exch.) 628; Jeudwine v. Agate, 5 Russ. 283; Wyatt v. Sadler, 5 Sim. 450.

<sup>8</sup> Cook v. Bolton, 5 Russ. 282; Brown v. Lake, 6 Coll. 620; Johnson v. Hammersley, 24 Beav. 498.

<sup>9</sup> Thompson v. Fisler, 38 N. J. Eq. 480, where the party applied by motion, grounded on complainant's delay.

<sup>10</sup> Fleming v. Prior, 5 Madd. Ch. 428; Williams v. Chard, 5 De G. &

next of kin;<sup>1</sup> or in proceedings for an account;<sup>2</sup> or in prosecuting a reference.<sup>3</sup> The party thus acquiring the conduct of the cause stands in the place of his predecessor in that behalf, and is entitled to inspect and take copies of all papers in the suit which may be in possession of the latter or his solicitor.<sup>4</sup>

**§ 606. Staying suits to await payment of costs in former suits.**—Where a suit at law has been discontinued by a plaintiff voluntarily, or through the negligence or default in any way of the plaintiff, and a new suit is brought for the same cause of action, or where a second suit is brought to try the same question over again, as in ejectment suits to try the same title, a court of law will order the second suit to be stayed until the costs of the first suit are paid.<sup>5</sup> A court of equity adopts and acts upon the same principle,<sup>6</sup> and will stay the proceedings in a suit until the costs of a former suit by the complainant in that court for the same matter have been paid.<sup>7</sup> The rule was applied where the complainant's bill in the former suit was dismissed upon demurrer.<sup>8</sup> The principle has never been extended so far, however, as to stay proceedings where the first suit was in a court of law and the last is in a court of equity;<sup>9</sup> nor where the party was not

Sm. 9; *Re Hutchinson's Trusts*, 1 Dr. & Sm. 80.

<sup>1</sup> *Sims v. Ridge*, 8 Mer. 458.

<sup>2</sup> *Hallett v. Hallett*, 2 Paige, 22; *Alvanley v. Kinnaird*, 8 Jur. 114.

<sup>3</sup> *Quackenbush v. Leonard*, 10 Paige, 181.

<sup>4</sup> 2 *Daniell's Ch. Pr.* (5th ed.) 1170; *Bennett v. Baxter*, 10 Sim. 417; s. c., 4 Jur. 50.

<sup>5</sup> *Sears v. Jackson*, 11 N. J. Eq. 45; *Mechart v. Halsey*, 8 Wils. 150. It was said in *Buckles v. Chicago & C. Ry. Co.*, 47 Fed. Rep. 429 (a case at law), that, being in the nature of an equitable discretion inherent in every court, the power should be exercised cautiously, *ex æquo et bono*, as the right and justice of the particular case may seem to require.

<sup>6</sup> *Holbrook v. Cracroft*, 5 Ves. 706, n. b; *Pickett v. Loggan*, 5 Ves. 702;

*Newland's Ch. Pr.* 412; 2 *Hoffman's Ch. Pr.* 77; *Udike v. Bartles*, 18 N. J. Eq. 231.

<sup>7</sup> *Kerr v. Davis*, 7 Paige, 53; *Spires v. Sewell*, 5 Sim. 193; *Udike v. Bartles*, 18 N. J. Eq. 231; *Ong v. Truelock*, 2 Molloy, 41.

<sup>8</sup> *Udike v. Bartles*, 18 N. J. Eq. 231, where the defendant asked that the proceedings be stayed until the costs of the former suit were paid, and that after such payment he be allowed time to plead, answer or demur. The application was sustained by proof of the identity of the cause of action, of the decree for costs in the former suit and of their taxation, and demand for payment.

<sup>9</sup> *Kerr v. Davis*, 7 Paige, 53; *Demarest v. Wynkoop*, 2 Johns. Ch. 461; *Stebbins v. Grant*, 19 Johns. 196.



legally liable for the costs of the first suit.<sup>1</sup> Thus where a suit abates by the death of a party the right to costs up to that time is extinguished;<sup>2</sup> and for a court to stay another suit until the defendants were paid their costs in the first suit, terminated in such a manner, would in effect be to award costs to the defendants in a case where they were not entitled to them.<sup>3</sup> If the matter of the two suits is so distinct that the second bill could not have been produced by a fair amendment of the first, the suit will not be stayed.<sup>4</sup> There are instances where, after a judgment of nonsuit against a person suing *in forma pauperis*, and another action by him for the same cause, the court has intimated that it would, in a case of great vexation, interpose to stay proceedings in the second cause until the costs of the former action were paid.<sup>5</sup> Where the identity of the suits is disputed it may be a proper course to refer the matter to a master;<sup>6</sup> or the chancellor may proceed to determine the question without a reference.<sup>7</sup> Upon granting a motion to stay proceedings the proper order is that the defendant have time to plead, answer or demur till the end of thirty days after the complainant shall have paid the costs of the former suit.<sup>8</sup> Where several suits are brought by dif-

<sup>1</sup> *Sears v. Jackson*, 11 N. J. Eq. 45; *Corbett v. Corbett*, 16 Ves. 410, where the first suit was dismissed without costs.

<sup>2</sup> *Sears v. Jackson*, 11 N. J. Eq. 45, 47; *Travis v. Waters*, 1 Johns. Ch. 89,—“unless the costs are payable out of a particular fund, or are connected with a duty towards the party claiming costs.” *s. c.*, per Platt, J. The “particular fund” must be one in court, or one over which the court has control. *Sears v. Jackson*, *supra*.

<sup>3</sup> *Sears v. Jackson*, 11 N. J. Eq. 45.

<sup>4</sup> *Budge v. Budge*, 12 Beav. 885, where the master of the rolls said that for the application of the rule he did not consider that the two bills should be identical; but it was sufficient if they were for the same matter; or if the second bill might be produced by a fair amendment of the first. The defendant’s motion

was refused with costs and permission to set off the same against the costs due from the plaintiff in the first suit.

<sup>5</sup> *Wild v. Hobson*, 2 Ves. & B. 112. See *Corbett v. Corbett*, 16 Ves. 410, holding that never on account of what passed in the former cause could a party be dispaupered in the second.

<sup>6</sup> See *Budge v. Budge*, 12 Beav. 885, 886.

<sup>7</sup> *Budge v. Budge*, 12 Beav. 885, 886.

<sup>8</sup> *Updike v. Bartles*, 18 N. J. Eq., 281, 282. A federal court will suspend proceedings on a creditor’s bill, where it appears that a state court had first acquired jurisdiction by a like bill, until the course of the state court has been developed. *Howlett v. Central Carolina L. & C. Co.*, 56 Fed. Rep. 161.

ferent legatees for general legacies with an allegation of a deficiency in the fund, it is a matter of discretion as to which suit the account shall be taken in. The court will direct the suit which is most beneficial for the legatees to be proceeded in; and if there is doubt on that subject will refer it to a master to ascertain which suit is most for the interest of the legatees and other persons interested in the estate.<sup>1</sup>

<sup>1</sup> *Ross v. Crary*, 1 Puige, 416.

END OF VOL. I















